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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vol. LXX.

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AMERICAN DECISIONS.

VOL. LXX.

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AMERICAN DECISIONS.
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CASES
IN THE
SUPREME COURT
OF
OHIO.

**COMMISSIONERS OF ASHLAND COUNTY v. DIRECTORS
OF RICHLAND COUNTY INFIRMARY.**

[7 OHIO STATE, 65.]

TOWNSHIPS ADVANCING MONEY TO RELIEVE INDIGENT PERSONS MAY RECOVER the same from the person or municipal authority obligated to support such persons only in case of a neglect of such obligation or a refusal to support such persons.

PAUPERS WHO BECOME SETTLED REMAIN CHARGE ON TOWNSHIP whose territory affords them a dwelling-place, without regard to the former name or boundaries of the township from which they have become separated.

NEW COUNTY, WHEN FORMED, SHALL RECEIVE AND BECOME CHARGEABLE with all paupers having a residence and legal settlement in the territory of which it is composed.

LUNATIC'S PLACE OF SETTLEMENT IS NOT INVALIDATED OR CHANGED by confinement in an asylum or jail by lawful authority.

DIRECTORS AUTHORIZED TO REMOVE PAUPERS TO COUNTY whose commissioners are obligated to receive them may sue and recover for breach of duty if such paupers are not received.

NEW COUNTY MADE BY DIVIDING OLD ONE IS NOT CHARGEABLE with any expense incurred by the old county in keeping a pauper whose proper residence is in the new one, until he has been removed to the new one with the request that he be received and taken care of by the commissioners.

EXPENSES OF RETURNING PAUPERS TO COMMISSIONERS OF NEW COUNTY carved from the old one, together with the charges for keeping them from that period, is the limit of recovery in case such paupers are not received.

DEBT, by defendants in error against plaintiffs in error. Mary Carlisle had a legal settlement in Green township, Richland county; became insane; was, under proper proceedings, sent to the lunatic asylum in 1839; was declared incurable and

returned to jail in 1844; and was afterwards maintained at the expense of the county in the infirmary. In 1846, the county of Ashland was created, partly out of Richland county, and Green township became a part of the new county. In 1847 the directors of the infirmary requested the trustees of Green township to take said Mary Carlisle off their hands and support her, and in 1849 they presented a bill for her support to the commissioners of Ashland county, and also took the pauper to them. They refused to receive her or to pay the claim. The jury found a verdict for the plaintiffs below for four hundred and fifty-one dollars and ninety-eight cents. Defendants appealed. Other facts are in the opinion.

B. W. Kellogg and W. Osborne, for the plaintiffs in error.

J. M. and M. May, and Stevens, for the defendants in error.

By Court, BOWEN, J. There was no provision made in the act to create the county of Ashland for the support of paupers who might have legal settlements within the territory which was then organized into a new county; nor is there any general statutory regulation on that subject. The questions that are presented in this case must therefore be determined upon the same principles of equity which have been applied heretofore to actions brought against townships to recover compensation for taking care of and supporting paupers who had settlements within them. Reported decisions of our own state, made in reference to the liability of such townships, afford us almost the only light we have on the subject, and leave us at liberty to adopt for present purposes the equitable rules which have governed our predecessors in this class of cases.

The act for the relief of the poor requires township authorities to afford relief to such persons found therein as may be in a suffering condition, whether they are legally settled there or not; and when a person becomes chargeable in a township other than the place of his or her legal settlement, an action may be brought against the trustees of the township where the pauper has a settlement, and the reasonable charges and expenses incurred for the support thus furnished recovered back: Sec. 9 of said act. The statute authorizes no other form of action for the recovery of such charges, nor does it confer any right of action against individuals in favor of townships that provide support for indigent persons. But it was held, in *Howard v. Whetsone Township*, 10 Ohio, 365, that a township which furnishes necessaries to the wife of one able to maintain her may recover the amount,

in an action of *assumpsit*, from the husband, in case he has driven her from his house by cruelty. So when relief is furnished to the wife of one able to support her, but who has abandoned her without cause, *assumpsit* may be maintained by the township against the husband to recover for the amount furnished: *Trustees of Springfield v. Demott*, 13 Id. 104.

These cases proceed on the principle that the sufferings of paupers and of indigent persons shall be relieved by the townships where they may be found in their destitute conditions, and that advancements made for such purposes are justly chargeable in equity and conscience to the person or municipal authority whose relation towards the pauper or indigent person creates a duty or imposes the necessity of furnishing aid, and that the obligation, when neglected or disregarded by those who should perform it, may be enforced in favor of whomsoever grants the relief, as for money paid out and expended for another's benefit. In the division of townships, it has been held that paupers pass with the territory on which they reside at the time the division or change takes place; and that if they have legal settlements within the limits of the territory divided, they retain them in the township where they actually reside at the time the change takes effect: *Center v. Wills*, 7 Ohio, 2d pt., 174; *Williamsburg v. Jackson*, 11 Ohio, 37. By this rule all paupers who become settled remain a charge upon the township whose territory affords them a dwelling-place, without regard to the former name or boundaries of the township from which they have been separated.

In the case now before us, the pauper was settled in Green township, Richland county; and while thus settled was removed to the lunatic asylum, and her disease being ascertained to be incurable, she was taken to the jail at Richland, and became a county charge.

The twenty-eighth section of the act in regard to lunatics and lunatic asylums, Swan's Stats. 1841, 578, provides that "if any lunatic or insane person shall be admitted into the asylum, and it shall be ascertained by the superintendent, after the expiration of sufficient time, under proper treatment, that the malady of such lunatic or insane person is incurable, the superintendent shall make such case known to some one of the directors, and such director shall, in case such lunatic or insane person be a pauper, issue his warrant for the discharge and removal of such pauper to the proper county; and that he or she be delivered to the jailer thereof, who is required to receive and provide for such person."

The duty of supporting her was thereby transferred from Green township to the county of which it formed an integral part, and after thus becoming released from the direct burden which it had formerly been compelled to bear, the county of Ashland was formed by an act of the assembly, and Green township was separated from its old county relations, and placed into and made to form a part of the new county. It is claimed that this change of the county lines, and the transferring of Green into a new county, cast, as a necessary incident, upon Ashland the burden of maintaining this pauper. But to this it is replied, on the other hand, that the liability of Richland county having become fixed, by operation of law, to take care of the lunatic, Green township was thereby exonerated, and took her place in the new county, unincumbered and free of this charge. This may seem plausible until we recur to the fact that no change of settlement of the pauper has occurred. Her absence from the township while in the asylum, and her confinement in the jail of Richland, and her maintenance by contract in other townships, resulted from legal proceedings had against her, and do not in any respect invalidate or change her place of settlement. The county of Richland can derive no further revenue from Green township. The right to tax its property, and to impose duties upon its inhabitants, has vested in another municipal body. To us it seems inequitable that the place of legal settlement, from which first originated the county's liability to maintain the pauper, shall be set over to another jurisdiction, and its civil, political, and social relations with its old associated townships severed, and not carry along with it into the new department an incumbrance which can never rest anywhere else without some special enactment. It is deemed to be in accordance with the spirit of past decisions, before referred to, that a new county, when formed, shall receive and become chargeable with all paupers having legal settlements in the territory of which it is composed. Mary Carlisle was an incurable lunatic pauper of Green township, by means whereof the county of Richland became, by the provisions of the statute, bound to provide for her wants. From the performance of this duty it had no power rightfully to refrain, while its relation towards the township continued. But when the legislature saw proper to establish a new county, and to give to it this incumbered portion of Richland, it imposed, as we think, upon the new county the duty of removing the incumbrance and charge from Richland, and of taking upon itself the burden.

The eighth section of the act authorizing the establishment of poor-houses, Swan's R. S. 614, provides that in any county within which a county poor-house is or may be erected, it shall be the duty of the directors to give an order to the auditor of the county for the payment of such necessary expense as may have been incurred by any township in removing any pauper to the poor-house, or that may have been incurred immediately preceding such removal by reason of delay caused by the sickness of such pauper; and the auditor shall draw his order on the county treasurer for such amount.

The directors of the county infirmary of Richland were authorized to remove Mary Carlisle to the proper place of her residence, which, as we have already shown, was in Ashland county, and to demand and receive the charges for her removal, as well as for her support furnished by them. It was the duty of the commissioners of Ashland county, when the pauper was offered to them, to accept and to take care of her. Their refusal was a breach of duty for which they could be sued, and a recovery had. This action was therefore properly brought in the name of the plaintiffs below: R. S. Ohio, 1854, 615, sec. 10.

A question has been raised by plaintiffs in error as to the amount which is properly recoverable in this case. The release of the county of Richland from the charge of supporting the pauper could be made complete at any time after the organization of Ashland; but to accomplish that object, something was necessary to be done. The commissioners of the latter county ought to have been notified of their liability, and requested to take the pauper, and provide for her. Anything done by the directors of the infirmary previous to such notice and request, in supporting the lunatic, cannot be regarded in the nature of temporary aid. She had been committed to their custody, and was to be maintained without any expectation of having recourse upon any other body for remuneration. It was only by an act of the legislature, which took effect while the pauper was getting her support, as of right, in the infirmary, that Richland county became entitled to free itself from this burden. The directors might hasten or delay the period of her removal to the new county. But we are of opinion that no recovery can be had by the plaintiffs below for any charges incurred before the return of the pauper to the proper place of her residence, and a request that she be received and taken care of by the commissioners.

The proof shows that the proper notice and offer of the pauper

to the commissioners were made on the fifteenth of December, 1849. The expense of going to Ashland county, at that time, and a just remuneration for keeping the pauper since, are proper to be recovered, and a verdict and judgment ought to have been rendered for them. The court, however, directed the jury that they might render a verdict for compensation from the time the pauper was admitted into the infirmary to the commencement of the suit. This, we think, was erroneous. The recovery, in this instance, must be limited to the expenses of returning the pauper to the county commissioners, and to the charge of keeping her from that period, as there was a refusal by the latter to receive her. We cannot correct the verdict without the consent of parties, and must therefore reverse the judgment for this erroneous instruction to the jury, and remand the cause for further proceedings.

BARTLEY, C. J., and SWAN and SCOTT, JJ., concurred.

BRINKERHOFF, J., having formerly been of counsel in the case, did not sit.

DOMICILE OR RESIDENCE OF LUNATIC IS NOT CHANGED even by his removal to an asylum in another state: *Clark v. Whitaker*, 46 Am. Dec. 337.

CITATIONS OF PRINCIPAL CASE.—The general theory upon which legislation for the relief of the poor was framed was that each township should bear the burden of sustaining the poor having a legal settlement therein. And the same idea forms the basis of all provisions for casting the burden of support on counties, as in case of incurable lunatic returned from the asylum: *Directors of Infirmary of Marion Co. v. Trustees of Westfield Township, Morrow Co.*, 21 Ohio St. 376, citing the principal case. Section 8 of the "act for the relief of the poor," passed March 14, 1853, Swan & Critchfield, 925, allows an action to be brought by one township against another, in the county in which either of the townships may be situated. Section 10 of the "act to authorize the establishment of poor-houses," Swan & Critchfield, 927, requires the directors of county infirmaries to provide for paupers having a residence without the limits of their county, and confers upon them all the power and authority theretofore vested in overseers of the poor or township trustees. And in *Directors of Muskingum Co. Infirmary v. City of Toledo*, 15 Ohio St. 410, it was held that such directors could maintain an action against a city of the second class in another county, where the boundaries of such city are identical with those of a township, and such township has thereby become merged in the city, for, etc., incurred in furnishing temporary relief to and removing an insane pauper having a legal settlement in such city. The principal case was there cited to the point that the directors were thereby as fully authorized to maintain such an action as township trustees were, under the existing laws. In counties where there was an infirmary, the general provision of the statute is, "that no person shall be admitted to any such infirmary as a pauper, unless upon the order or warrant of the trustees of the proper township, directed to the board of directors of the infirmary of the proper county," showing the legal settlement of the pauper in the township,

or other proper ground for his being a statutory charge in the township: *Swan & Critchfield*, 928, 930, 933. Nor in such case is the settlement of the pauper in his proper township lost, but continues as before: *Directors of Infirmary of Marion Co. v. Trustees of Westfield Township, Morrow Co.*, 21 Ohio St. 377, citing the principal case.

EX PARTE SHAW.

[7 OHIO STATE, 81.]

WRIT OF HABEAS CORPUS CANNOT BE USED TO REVIEW ERRORS AND IRREGULARITIES in proceedings resulting in conviction and sentence. A writ of error is the proper remedy.

SENTENCE VOID FOR WANT OF JURISDICTION OVER OFFENSE MAY BE ASSAILED ON HABEAS CORPUS, and the relator discharged.

HABEAS CORPUS CANNOT BE USED TO ATTACK JUDGMENT OF COURT possessing general jurisdiction in criminal cases.

QUESTIONS OF DOUBTFUL JURISDICTION SHOULD BE SOLVED BY WRIT OF ERROR, and not by *habeas corpus*.

SENTENCE FOR SHORTER TERM THAN PERIOD REQUIRED BY LAW IS ERRONEOUS, not void, and cannot be attacked on *habeas corpus*.

RETURN OF HABEAS CORPUS INTO SUPREME COURT IN TERM TIME RESTS IN DISCRETION of the judge who allowed the same; and the regular business of that court will not be put aside to hear such returns where the judicial system will permit them to be heard in other courts with less delay and inconvenience.

TO USE HABEAS CORPUS AS WRIT OF ERROR IN ANNULING SENTENCES IS ABUSE which cannot be too soon corrected.

HABEAS CORPUS. The relator had been indicted for horse-stealing, and was sentenced to hard labor for the period of one year. The question presented in the case is given in the opinion.

J. A. Corwin, for the relator, Shaw.

By Court, SWAN, J. The question presented in this case is whether, conceding that the sentence is for horse-stealing, and that by statute the sentence must be for a period not less than three years, the commitment is lawful.

The courts are required by statute, upon conviction, to sentence for a period not less than three years. The sentence in this case is for one year. Does this render the sentence void, and the commitment of the relator unlawful? The question is one simply of jurisdiction.

The court had jurisdiction over the offense and its punishment. It had authority to pronounce sentence; and while in the legitimate exercise of its power, committed a manifest error

and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous.

The writ of error and *habeas corpus* have each their separate offices. There are ample remedies provided for the correction of irregularities and errors in proceedings which result in conviction and in sentences by writ of error. For errors and irregularities in such cases, the summary remedy by *habeas corpus* cannot be had: *Ex parte Kellogg*, 6 Vt. 509; *Matter of Prime*, 1 Barb. 340. But if the court has sentenced the relator for an offense over which, by law, it had no jurisdiction whatever, so that the proceedings and sentence were manifestly *coram non judice* and void, the imprisonment following such void sentence would have been unlawful, and the relator entitled to be discharged on *habeas corpus*: *Cropper v. Commonwealth*, 2 Rob. (Va.) 842; *Ex parte Watkins*, 3 Pet. 202.

The statute excepts from those who are entitled to the benefit of this writ persons convicted of some crime or offense for which they stand committed, plainly and specially expressed in the warrant of commitment. The exception of persons convicted applies particularly to the application now under consideration. The relator is detained by virtue of the judgment of a court possessing general jurisdiction in criminal cases. This judgment cannot be re-examined on *habeas corpus*.

Questions of doubtful jurisdiction are frequently involved in a record, which are proper subjects of consideration upon a writ of error; and which should not therefore be entertained or decided upon *habeas corpus*.

The return of a writ of *habeas corpus* into this court, in term, rests in the discretion of the judge of this court who allows the same; and as parties may, in general, have relief by application to probate and common-pleas judges with less delay and inconvenience, we do not deem it proper, unless under very peculiar circumstances, to put aside the regular business of this court by making applications of this kind returnable in term.

It is said to be the practice in some parts of this state to use the writ of *habeas corpus* as a short and summary mode of reviewing, as upon a writ of error, and annulling the sentences of courts. If this be so, it is an abuse of the writ of *habeas corpus* which cannot be too soon corrected.

The prisoner is remanded to the custody of the warden.

BARTLEY, C. J., and SCOTT, BRIDGERHOFF, and BOWEN, JJ., concurred.

EFFECT OF SENTENCE FOR SHORTER TERM THAN THAT AUTHORIZED BY LAW: See Freeman on Judgments, sec. 625, citing the principal case and commenting upon it; Church on Habeas Corpus, sec. 372, citing the principal case. On other points contained in the syllabus, see extended note to *Commonwealth v. Lecky*, 26 Am. Dec. 40-49, showing how far a court can go behind judgment or process on *habeas corpus*: *Williamson's Case*, 67 Id. 374, and copious note thereto 395.

THE PRINCIPAL CASE WAS CITED in *Ex parte Bushnell*, 9 Ohio St. 183, to the point that if a court, having jurisdiction over an offense punishable by a valid and constitutional law, pronounces sentence, and the commitment under that sentence is returned on *habeas corpus*, the form of the indictment, or the want of proper allegations therein, cannot be inquired into; for this process cannot be converted into a writ of error. In such case, the court, having jurisdiction over the offense, must itself pronounce the law of the case, and until reversed by some competent tribunal, is conclusive on all other courts, and puts an end to all collateral inquiry on *habeas corpus*.

McAFFERTY v. CONOVER'S LESSEE.

[7 OHIO STATE, 99.]

PAROL EVIDENCE IS ALWAYS ADMISSIBLE TO DETERMINE WHETHER MONUMENTS found on land are identical with those mentioned in the deed describing it.

INTENTION OF PARTIES CANNOT TAKE PLACE OF CALL IN DEED which is unambiguous, although the call was in fact not intended by the parties.

EFFECT WILL BE GIVEN TO INTENTION OF PARTIES, IN RESPECT TO CALLS IN DEED, only where the words of description they employ will admit of it, and are not inconsistent with the intention proved; further than this a court of law cannot go.

ACTS CONSTITUTING ESTOPPEL IN PAIS MUST BE WILLFUL to operate as a forfeiture of land.

AGREEMENT BY MISTAKE UPON ERRONEOUS LINE AS BOUNDARY, supposing it to be the true one, will not operate as an estoppel upon the parties where the true line is in fact unquestionable.

EJECTMENT. Thomas J. Conover owned the Chambers tract of land, situated on the north side of the county road. McAfferty and Stimpsons owned the tract adjoining on the south side of the road, and one Smith owned the tract of land adjoining the Chambers tract on the east. Conover and Smith hired a surveyor to survey the Chambers tract. There was no doubt about its true lines, for the monuments still existed. The surveyor left out a strip of the Chambers tract four rods wide, lying along the county road, and containing two acres. According to the line thus made, four rods back from the road monuments were placed and the fences changed to this new and erroneous line. Conover then tried to purchase this strip between the

new line and the road from McAfferty, who at first disclaimed ownership of it, but finally sold it to Conover. The deed described the strip as follows: "Beginning at the south-east corner of the Chambers tract, now owned by said Thomas J. Conover; thence west eighty rods; thence south four rods; thence east eighty rods; thence north four rods to the place of beginning, containing two acres of land, strict measure." Afterwards Conover found that his land really extended to the road in the first place; that the strip of land was already his own when he paid for it. Conover asked McAfferty to refund the money paid him, but the latter refused. Conover then brought ejectment for a strip containing two acres on the south side of the road, claiming under the deed from McAfferty. Defendants obtained a verdict in the common pleas; but on appeal to the district court a verdict was rendered for Conover. On the trial, the defendants offered to prove the facts narrated, and to show that the land intended to be conveyed was located on the north side of the road. It was admitted that by the true lines of the Chambers tract it extended to the county road. The court ruled out the testimony.

Thomas Millikin, for the plaintiffs in error.

John R. Lewis, and Scott and McFarland, for the defendant in error.

By Court, SWAN, J. No doubt the rights of these parties could be readily adjusted, and upon just principles, in a court of equity. Our inquiry now is, What are their rights at law?

1. Can McAfferty and Stimpsons be permitted to show that, by the call in their deed of "the south-east corner of the Chambers tract," they and Conover meant and intended the corner made by the then recent survey?

Nothing is more common, upon the trial of cases to settle conflicting boundaries, than the admission of parol evidence of third persons, and proof of the declarations of the parties in interest, in relation to corners. In the application of the description of land in a deed to the land itself, the fact whether the monuments found thereon are identical with those mentioned in the deed is always the subject of parol evidence. And when the calls of the deed and the objects found on the land render it uncertain which of the objects found were called for, parol evidence, the admissions of the parties, or other extraneous circumstances may be proved to show which of the objects were in fact called for by the deed. In such case, there is a latent

ambiguity arising *in pais*, and to be settled by proof *in pais*. Nor does such proof contradict the description in the deed. It simply aids in its interpretation, and gives application to its description of the land. But where there is a call in a deed which was in fact not intended by the parties, and is found, and is unambiguous, the intention of the parties cannot be made to take the place of the call; for if this could be done, titles and lands would be transferred by the intention of parties and not by deed. Effect will be given to the intention of the parties in respect to calls only where the words of description they employ will admit of it, and are not inconsistent with the intention proved; further than this a court of law cannot go; beyond this is the region of equitable jurisdiction, under the head of mistake.

In this case, it was admitted as a matter of fact, on the trial and by the bill of exceptions, that "the south-east corner of the Chambers tract" is on the county road; the controlling corner of the land described and conveyed by the deeds of McAfferty and Stimpsons to Conover; and the only locative call in the deeds. This admission precludes any doubt as to where the south-east corner of the Chambers tract is; sets at rest any question of latent ambiguity; so that, if the proof of the intention of the parties to the deeds is received and acted upon, it would contradict this call, and transfer all the calls of the deed from the south side of the county road into the Chambers tract. Such a transition of a tract of land cannot be made by proof of intention, in contravention of the calls of a deed. It is very clear that Conover made a mistake when he purchased from McAfferty and Stimpsons his own lands; and that McAfferty and Stimpsons made a mistake in conveying to Conover their own lands south of the county road.

2. It is claimed that Conover made a new south-east corner for the Chambers tract, represented the same to be the true corner, and induced the plaintiffs in error to act on that representation; and hence Conover is estopped by his own acts and admissions from denying that the new corners are the true corners. As a general rule, a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter.

Estoppels by deed or by matter of record sometimes conclude the party without any reference to the moral qualities of his conduct. But estoppels *in pais* are not allowed to operate ex-

cept where, in good conscience and honest dealing, the party ought not to be permitted to gainsay his admission: *Commonwealth v. Molts*, 10 Pa. St. 531 [51 Am. Dec. 499]. And in general, the act or declaration of the party must be willful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party: *Copeland v. Copeland*, 28 Me. 525; *Tilghman v. West*, 8 Ired. Eq. 183. This kind of estoppel was first established by courts of equity, and has since been extended to courts of law.

It is founded on fraud. There are implied warranties and implied guaranties which are enforced, not as estoppels *in pais*, but as contracts, and in which the question of fraud or fair dealing may or may not be involved. Whether it be a rule without exception that an estoppel *in pais* must always be accompanied with the willful act or declaration of the party upon whom it is to operate, we do not decide; but we do hold that such act or declaration should be willful to operate as a forfeiture of lands.

Thus where the true lines are in fact unquestionable, and parties by mistake agree upon an erroneous line as their boundary, and suppose the line agreed upon to be their true line, and fence to it, their acts and declarations do not operate in the nature of an estoppel. A party will not forfeit his estate by a mere mistake; nor can the statute of frauds be thus evaded. Something more is required to transfer the title. If there has been acquiescence, adverse possession, and improvements made in accordance with such erroneous line, under such circumstances as that the owner is chargeable with gross negligence amounting to fraud, an estoppel *in pais* may probably permanently establish the erroneous line.

There is another class of cases where the line between owners of land cannot with certainty be ascertained; and because uncertain, they agree upon and establish the line. Such agreement settles the line; not by estoppel, but by agreement.

In the case before us, the corners of the Chambers tract were in fact indisputable. The parties acted under an honest mistake, without fraud or intentional deception. Declarations thus made do not operate in the nature of an estoppel to forfeit the title to land.

It is proper to remark that the deeds made by McAfferty and Stimpsons describe and convey on their face a strip of land, and the proofs of the acts and parol declarations of Conover would, if an estoppel *in pais*, convey another and different strip of land. A title to an entire tract of land dependent upon the estab-

lishment by parol proof of the acts and parol declarations of a third person is not quite as certain and convenient a title as the law has in general so wisely provided for by deed and record. And this at least shows that the doctrine of estoppel *in pais*, however safe in courts of equity, should be carefully and cautiously applied to titles at law.

On the whole, we are of the opinion that in this case one tract of land was conveyed by mistake instead of another; and the mistake cannot be corrected at law by proof of the intention of the parties; and that, under the circumstances of this case, and their relations growing out of mutual mistakes as to the purchase and the deed, justice and good faith does not require the application of the law of estoppel *in pais* to the conduct and declarations of Conover.

Judgment of the district court affirmed.

BARTLEY, C. J., and BRINKERHOFF and BOWEN, JJ., concurred.

SCOTT, J., having formerly been counsel, did not sit.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CORNER CORRESPONDS with the call of the entry or survey; *McCoy v. Galloway*, 17 Am. Dec. 591, 593, but where the land is described by courses and distances only, parol evidence to prove that the true boundary is a line of marked trees not mentioned in the deed, and varying from the written calls of course and distance, is inadmissible: *Wynne v. Alexander*, 47 Id. 326. Identical monument referred to in deed may always be shown by parol: *Emery v. Webster*, 66 Id. 274.

LINE NAMED IN DEED WILL PREVAIL over one marked by the parties at the time of its execution: *Wynne v. Alexander*, 47 Am. Dec. 326. The rules governing where description of land is inconsistent or uncertain will be found discussed at length in the note to *Heaton v. Hodges*, 30 Id. 734-742. Certain, definite, and clear description in deed cannot be controlled by intention of the parties: See note to *Stone v. Clark*, 35 Id. 373.

EFFECT OF MISTAKE AS TO TRUE LINE: *Carroway v. Chancey*, 64 Am. Dec. 577, and notes 579; *Brewer v. Boston etc. R. R. Co.*, 39 Id. 694, and notes 697; *Riley v. Griffin*, 60 Id. 726; note to *Crowell v. Maughs*, 43 Id. 64.

INTENTION OF PARTIES TO DEED WILL GOVERN WHEN: *Stone v. Clark*, 35 Am. Dec. 370; *Budd v. Brooks*, 43 Id. 321; *Emery v. Webster*, 66 Id. 274.

ERRONEOUS ADMISSION AS TO BOUNDARY LINE, MADE IN GOOD FAITH AND BY MISTAKE, IS NO ESTOPPEL; *Brewer v. Boston etc. R. R. Co.*, 39 Am. Dec. 694; *Jackson v. Woodruff*, 13 Id. 525; *Osborne v. Endicott*, 65 Id. 498. Doctrine of estoppel *in pais* is discussed in *Titus v. Morse*, 63 Id. 665.

THE PRINCIPAL CASE contains the settled doctrine that where adjoining proprietors, under a mutual mistake as to the locality of the two lines between them, respectively occupy up to and acquiesce in a line other than the true one for a period less than twenty-one years, neither party is, in general, estopped to assert title up to the true line. This is a question of estoppel *in pais*, and was distinguished as such in *Yetzer v. Thoman*, 17 Ohio St. 133,

from one involving the application of the statute of limitations, which was the nature of the latter case. It was conceded in one of the defenses to *Bobo v. Richmond*, 25 Id. 121, that the line agreed upon was not the true line, and that the true line was a certain fixed line known to the parties, about the location of which there could be no dispute, though it was never actually run and established. This case was distinguished from the principal one. In the principal case the true lines and corners were fixed and certain, and the lines and corners sought to be established were made by mistake, and not by agreement of adjoining land-owners, and hence the court in deciding that case said "that the acts of the parties in making such mistake, and the declarations or admissions induced by such mistake, and the fencing of both parties in accordance with such mistake, do not operate, in the nature of an estoppel *in pais*, to forfeit the estate." The case of *Nye v. Denny*, 18 Id. 254, was considered to be within the rule of the principal one, and the latter was there cited to the effect that to work an estoppel *in pais*, and forfeit title, the acts and declarations of the owner must, in general, be willful; that is, with knowledge of his rights, or with intention to deceive the other party.

KANAGA v. TAYLOR.

[7 OHIO STATE, 134.]

ENFORCEMENT OF CHATTEL MORTGAGE IN FOREIGN JURISDICTION.—Chattel mortgagee holding valid and legal chattel mortgage by the state law in force where he obtained it may enforce it in the courts of Ohio, even against a purchaser without notice of the mortgage, where the property, before breach of condition, has been removed to Ohio, and beyond the jurisdiction of the state in which the mortgage was given.

OBJECT OF REGISTRY LAWS IN REQUIRING CHATTEL MORTGAGES TO BE RECORDED at the place of the transaction, or where the mortgagor may reside, is to convey notice to others who may wish to become interested as purchasers or lien-holders in the same property.

NEW REGISTRATION OF CHATTEL MORTGAGE, IN OTHER TOWNSHIPS, OR IN OTHER STATES, IS NOT REQUIRED where a legal registration at the time, and in the place and manner pointed out by the law of the place of the transaction or residence of the mortgagor, has given validity to the contract; because when that act is done, the whole duty in regard to the contract is at an end, although the property be removed, before condition broken, into a foreign jurisdiction.

LEX LOCI CONTRACTUS CONTROLS AS TO CONSTRUCTION AND VALIDITY OF PERSONAL CONTRACTS.

LEX FORI GOVERNS PROCEDURE AND EVIDENCE in actions on personal contracts.

CONTRACT MADE IN ONE STATE, AND TO BE PERFORMED IN ANOTHER, will, if it be valid under law where it was made, and not in contravention of the latter's laws, be presumed to have been entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and effect of the contract.

NO RULE OF COMITY OR INTERNATIONAL LAW REQUIRES COURTS OF ONE STATE TO ENFORCE the law of another, where the law of the latter state

clashes with the rights of citizens of the former, or with the policy of its laws.

CONTRACT VOID UNDER LAW WHERE IT IS MADE IS VOID EVERYWHERE. NEW YORK LAW OF CHATTEL MORTGAGES IS IN HARMONY WITH LAW OF OHIO upon the subject, and effect will be given to it in the latter state.

MOTION for a new trial. Plaintiff claimed the amount due on a chattel mortgage made to secure unpaid payments on a certain piano. Defendant claimed to have purchased the piano on or about September 17, 1853, of one Henry Moore, an auctioneer, in Cleveland, Ohio; and asserted title and right of possession in himself. Verdict for plaintiff. It appeared from the bill of exceptions that on June 17, 1853, the plaintiff, at Buffalo, New York, sold the piano to one William Gregory of that place, on the installment plan. The first payment was made, and a mortgage executed on the piano by Gregory to secure the balance. The piano was delivered to Gregory, and taken by him to his residence in Buffalo, with the understanding that it was to remain with his family for private use. Within two weeks after the execution of the mortgage Gregory removed the piano to Cleveland, Ohio, where he, on July 12, 1853, pledged it to Moore, and received a sum of money upon it. This transaction was accompanied by a privilege to sell if the money was not refunded within sixty days. Gregory subsequently got another advance on the piano, and entered into a written agreement to warrant and defend Moore in possession of the same until the money was repaid. Gregory informed Moore that there was no lien or claim against the property. The piano was sold to defendant on September 17, 1853. Moore had no notice of any lien or claim against the property until late in the fall of the same year, when he was notified of the mortgage, and the piano demanded. The mortgage was not recorded in Ohio. Moore and defendant were citizens of that state. Other facts appear in the opinion.

Bishop, Backus, and Noble, for the defendant, in support of the motion.

Willey and Cary, for the plaintiff.

By Court, **BOWEN, J.** The motion for a new trial, in this case, is urged by the counsel for defendant on the ground, mainly, that the plaintiff's lien, by virtue of his mortgage, was lost by the mortgagor's bringing the property into this state and disposing of it here to a purchaser having no knowledge of the mortgage.

It is admitted that the instrument under which the plaintiff claims to recover was valid in New York. It was not only executed as the law there requires it should be, but it was registered in accordance with the statute, in the town where both parties resided, and the possession and use of the chattel by the mortgagor were there fully sanctioned by law. Before any breach in the payment of the money had occurred, the property was removed into this state, and became subject to our laws. This removal was without the plaintiff's permission; and if the transaction be closely scanned, it was, as to the mortgagor, an act not characterized by too strict regard to integrity or the rights and expectations of the mortgagee. Almost as soon as he arrived in Cleveland he began to manifest an intention to defeat the plaintiff's security. He at first assumed to pledge it to Moore as the property of another, and not his own. He apprised Moore, however, that he had just come from Buffalo. After getting as much for the piano as he could, by the devices which he adopted, he allowed it to be sold, knowing quite well that he had not paid for it, and that the security might, and as he doubtless supposed would, by such act of his, be entirely cut off as to the mortgagee, who had sold him the property. There is nothing to show the least want of diligence on the part of the plaintiff. The money secured by the mortgage became due on the seventeenth of September, 1853, on which day the sale was made to the defendant in Cleveland. This action was commenced in March following, by a citizen of New York. Shall he be allowed to enforce his lien under the mortgage in the courts of this state?

The statute law of New York in regard to the record of chattel mortgages is, in the object and spirit of it, almost identical with ours. Mortgages or bills of sale of personal property, and intended to operate as such, must be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing mortgaged, or the instrument deposited with the clerk of the township where the mortgagor resides, or if a non-resident, where the property shall be at the time of its execution, else, by the law of this state, the mortgage is void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith: R. S. Ohio, 1854, 315.

The law of New York is founded in the same policy, and contravenes no rights of our citizens, and is not at variance with any law, nor in violation of any principle of our government, either

civil, political, or moral. Had the same mortgage been executed and filed for record here, it would be our duty to give it effect, and protect the parties in their rights under it. The registry of such instruments is required to be made at the place of the transaction, or where the mortgagor may reside, in order to convey notice to others who may wish to become interested as purchasers or lien-holders in the same property. It gives to the public the means of learning what has been transacted in relation to the incumbrance of property, and of deriving benefit from a knowledge of it, which, in the absence of such salutary regulation, would be in the secrets only of the immediate parties interested, and might lead to the perpetration of frauds upon innocent persons. When that act is done which is necessary to give validity to the contract, at the time, and in the place and manner pointed out, the whole duty in regard to it is at an end. It is not made necessary to go into other townships nor into other states to procure new registrations. The law has, for wise purposes, omitted any such requirement. Holding this instrument, then, as the plaintiff did, as a legal and valid one by the law in force where he obtained it, he was entitled to enforce it; but as the power to do that had been cut off by the removal of the property beyond the jurisdiction of the state, it was proper for him to sue in the courts of this state, and to derive the same relief by his action as if he were pursuing a remedy where the contract was made: *Offutt v. Flagg*, 10 N. H. 46; *Martin v. Hill*, 12 Barb. 632.

It is a general rule of international law that the rights of the parties to a contract, as distinguished from their remedies, are to be determined by the law of the place where the contract is to be performed. If a contract be made in one state or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and effect of the contract. This general rule, however, has its exceptions; one of which is that where a contract is declared void by the law of the state or country where it is made, it cannot be enforced as a valid contract in any other, though, by its terms, it was to have been performed there: *Hyde v. Goodenow*, 3 Conn. 266. So if the law of another government is in conflict with our own system of jurisprudence, or contravenes the policy of our government, there is no rule of comity or of international law which imposes on us the least duty to observe it.

In this case, as has already been shown, the New York law of chattel mortgages is entitled to full consideration for its harmony with our own law upon the subject, and we feel no hesitation in giving effect to it.

Gregory held the property subject to the condition of the mortgage, which was the payment of the money, as specified therein, or in case of default, the plaintiff was authorized to take possession of and to sell it. The default occurred after the property had been removed into a foreign jurisdiction. Gregory had no power to confer any better title than he held; and those who might desire to purchase of him were bound by the rule of *caveat emptor*. True, there was no record of the mortgage in Ohio, but Gregory was a stranger to Moore, and apprised him that his late residence was Buffalo. This ought to have excited inquiry by Moore, which might quite as well have been instituted in Buffalo as in another county of this state. He cannot charge upon the plaintiff the consequences of this neglect of his. He took the property subject to the incumbrance upon it; and that amount, we think, was very properly found and reported by the jury in favor of plaintiff.

The motion for a new trial is overruled, and a judgment may be entered on the verdict.

SWAN, BREMERHOFF, and SCOTT, JJ., concurred.

BARTLEY, C. J., concurred in the judgment of the majority of the court, but differed as to the grounds upon which the majority placed it.

LEX LOCI CONTRACTUS GOVERNS AS TO VALIDITY AND CONSTRUCTION OF PERSONAL CONTRACTS, unless another place is appointed for its performance: See notes to *McAllister v. Smith*, 65 Am. Dec. 660, collecting prior cases.

LEX FORI GOVERNS REMEDY UPON PERSONAL CONTRACTS: *Wilson v. Hooper*, 36 Am. Dec. 366; *McAllister v. Smith*, 65 Id. 651, and note 660, collecting prior cases.

NO NATION IS BOUND TO RECOGNIZE OR ENFORCE ANY CONTRACT which is injurious to its own interests, or to those of its own citizens, or which is in fraud of its laws: *Smith v. Godfrey*, 61 Am. Dec. 617; *Phinney v. Baldwin*, Id. 62, and notes 64.

CONTRACT VOID UNDER FOREIGN LAW IS VOID EVERYWHERE, and will not be enforced in the home courts, although it is valid under the home law: *McAllister v. Smith*, 65 Am. Dec. 651, and note 660.

THE PRINCIPAL CASE WAS CITED in *Fuller v. Steiglitz*, 27 Ohio St. 364, to the point that a devise in Jamaica of personalty in Ohio would be governed by the laws of that island; and in *Bank v. McLeod*, 38 Id. 180, that the rights of mortgagees under a foreign mortgage conveying certain rolling stock of a railroad, said stock being temporarily in Ohio, would be determined by the law

loci contractus, when such contract was not contrary to the policy of the laws of Ohio, nor in conflict with the rights of its own citizens. In such a case, it was held that their courts would, by the law of comity, enforce the contract, and give it an extraterritorial operation.

REMOVAL OF MORTGAGED PROPERTY INTO ANOTHER STATE.—1. General Rule in States Which have Adopted Policy of Recording Mortgages of Personal Property—Object of Registry Laws.—It may be remarked that the removal of a mortgagor from the town in which he resided when the mortgage was executed, and where it was duly recorded, and the taking of the mortgaged property with him, does not invalidate the record of the mortgage, or necessitate the recording of it again in the town to which he has removed: *Pease v. Odenkirchen*, 42 Conn. 415; *Elson v. Barrier*, 56 Miss. 394; *Offutt v. Flagg*, 10 N. H. 46; *Hoit v. Remick*, 11 Id. 285; *Barrows v. Turner*, 50 Me. 127; *Brigham v. Weaver*, 6 Cush. 298; *Hicks v. Williams*, 17 Barb. 523. The object in requiring a mortgage to be recorded is to give publicity to such conveyances, and to provide sources of information common to all persons, in order to enable purchasers, and creditors, and all others to determine with some degree of facility, convenience, and certainty the question of title to property, whenever they may be interested to know it; while at the same time it is not among the purposes of the registry acts to subject a *bona fide* mortgagee, who is of course a creditor, to the inconvenience, if not impracticability, of the constant vigilance and ceaseless watching necessary to guard and secure his interests, if he were obliged to record his mortgage in every town into which the mortgagor might see fit to remove with the property. If he were required to do this, the mortgagee's security might be rendered worthless by a seizure of the mortgaged property under process of law at the instance of a creditor of the mortgagor; or, as was done in the principal case, the mortgagor himself might pass the title to it by way of sale to an innocent purchaser: *Hoit v. Remick*, *supra*. So if it be required that the mortgage should be recorded in the county of the mortgagor's residence, his removal with the property to another county does not necessitate the recording of the mortgage again in the county to which he removes: *Bevans v. Bolton*, 31 Mo. 437; *Fearl v. Rowell*, 62 Id. 524. And the general rule is, that a chattel mortgage valid under the law of the state where executed will be so held by the courts of a sister state to which the property may be removed: *Fearl v. Rowell*, *supra*; *Smith v. Hutchings*, 30 Id. 380; *Offutt v. Flagg*, *supra*; *Smith v. McLean*, 24 Iowa, 331; *Ryan v. Clanton*, 3 Strobb. L. 411; *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Clifford*, 37 N. H. 86; *Barker v. Stacy*, 25 Miss. 477; *Martin v. Hill*, 12 Barb. 631; *Blystone v. Burgett*, 10 Ind. 28; *Simms v. McKee*, 25 Iowa, 341; *Hall v. Pillow*, 31 Ark. 32; *Rhode Island Central Bank v. Danforth*, 14 Gray, 123; *Ames Iron Works v. Warren*, 76 Ind. 512; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 583; *Taylor v. Boardman*, 25 Vt. 581; *Cobb v. Buswell*, 37 Id. 337; *Whitman v. Conner*, 40 N. Y. Super. Ct. 339. Possession is merely *prima facie* evidence of title; and a creditor of the mortgagor attaching the property or a purchaser of it must, as was asserted in the principal case, look to the title, notwithstanding the holder of the property may have recently come from an adjoining state. There may be a mortgage upon the property in that state; and a purchaser or creditor must exercise his diligence by inquiring there, in accordance with the rule laid down in the principal case, whether the property is incumbered. The rule is similar to the one where the owner has recently removed from another part of the same state—the purchaser or creditor is bound to inquire at such former residence of the owner for incumbrances there recorded: See cases just cited.

2. *Principle upon Which General Rule is Based.*—If a mortgage be valid where it is made, if it be executed and recorded according to the laws of the state or country of its execution, it will be enforced in the courts of another state or country as a matter of comity, although it is not executed or recorded according to the requirements of the law of the latter state. And this is because of the general principle of law that the law of the place of contract governs as to the nature, validity, construction, and effect thereof: See the principal case, and *Edgerly v. Bush*, 81 N. Y. 199; *Martin v. Hill*, 12 Barb. 631; *Feurt v. Rowell*, 62 Mo. 524; *Blystone v. Burgett*, 10 Ind. 28; *Arnold v. Potter*, 22 Iowa, 194; *Smith v. McLean*, 24 Id. 322; *Simms v. McKee*, 25 Id. 341; *Hall v. Pillow*, 31 Ark. 32; *Beall v. Williamson*, 14 Ala. 55; *Barker v. Stacy*, 25 Miss. 471; *Langworthy v. Little*, 12 Cush. 109; *Rhode Island Central Bank v. Danforth*, 14 Gray, 123; *Ferguson v. Clifford*, 37 N. H. 86; *Offutt v. Flagg*, 10 Id. 46; *Ames Iron Works v. Warren*, 76 Ind. 512; S. C., 40 Am. Rep. 258; *Wilson v. Carson*, 12 Md. 54; *Ryan v. Clanton*, 3 Strobh. L. 411; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 583; *Tyler v. Strang*, 21 Barb. 198; *Nichols v. Mase*, 25 Hun, 640; *Whitman v. Conner*, 40 N. Y. Super. Ct. 339. This may be illustrated as follows: Where a mortgage was made in New Hampshire of property situated there, and recorded so that no change of possession became necessary for its validity under the laws of that state, and afterwards the property was removed to Vermont, where at the time no mortgage was valid without a delivery of possession, and it was there attached by the debtor's creditors, it was held that the mortgagee might recover it from the attaching officer, because his lien, being valid by the laws of New Hampshire, was equally valid in Vermont: *Cobb v. Buswell*, 37 Vt. 337; *Taylor v. Boardman*, 25 Id. 581; *Jones v. Taylor*, 30 Id. 42, overruling *Skiff v. Solace*, 23 Id. 279. By a legal fiction, personal property is supposed to adhere to the person of the owner, and, unlike real property, to be governed by the law of the place where the owner is domiciled, and not by the law of the *situs* of the property. This doctrine rests upon the maxim, *Mobilia ossibus inhaerent*. But an assignment of personal property, by way of mortgage, is an exception to this general rule. The law of the *situs*, and not the *lex domicilii*, governs chattel mortgages. Expressed in other words, a mortgage of chattels is governed by the law of the place where the chattels are located at the time of the execution of the mortgage. Thus it will be seen that this fiction is not of universal application, and must yield whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined: *Ames Iron Works v. Warren*, 76 Ind. 512; S. C., 40 Am. Rep. 258; *Clark v. Tarbell*, 58 N. H. 88; *Green v. Van Buskirk*, 7 Wall. 139. Every state has entire jurisdiction over all property, personal as well as real, within its own territorial limits, and the laws of the state regulate and control its sale and transfer, and all rights which may be affected thereby. So where a state court is administering justice between its own citizens alone, it will determine the right to mortgaged property which has been removed to a foreign jurisdiction. A strong illustration of this is found in *Edgerly v. Bush*, 81 N. Y. 199, where a resident of the state of New York executed a mortgage upon a span of horses to another resident of that state. The horses at that time were in the state named. Subsequently the mortgagor took the horses to Canada, where they were sold by a regular trader dealing in horses to one who purchased in good faith, without knowledge of the mortgage. Under the laws of Canada, property cannot be reclaimed from one so purchasing without refunding to him the price paid. A resident of New York afterwards bought the horses of such purchaser, but left them in Canada. The

mortgagee demanded the horses of the last purchaser, and in an action brought in New York against him for their conversion, was held entitled to recover. Folger, J., in delivering the opinion, said: "The law of the domicile, and the law of the then *situs* of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law, as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law, too, an owner of property may not be divested of it without his consent or by due process of law; plainly not by a dealing with it by others without his knowledge, assent, or procurement. Still, another state may make provision by statute in respect to personal property actually within its jurisdiction. Though a transfer of personal property valid by the law of the domicile is valid everywhere, as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual *situs* of the thing be examined: *Green v. Van Buskirk*, 7 Wall, 139. Yet the statutes of that land have no extraterritorial force *proprio vigore*, though often permitted by comity to operate in another state for the promotion of justice, where neither the state nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case: *Per Parker, C. J., in Blanchard v. Russell*, 13 Mass. 6. It is plain that on no principle of comity applicable to this case could the sale of the plaintiff's property by another having no authority from him, to his wrong, indeed, be upheld, save that it was authorized by the statute of Lower Canada. So that the question is one entirely of the comity to be shown by the courts of this state to the enactments of another country. Those statutes not only enact the rule of market overt as it prevails in general in England, but carry it further, and make, as in the city of London, every sale by a trader dealing in like articles as good as a sale at market overt. That rule does not obtain in this state. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy and to the inconvenience of our citizens if we should give effect to these statutes of Lower Canada, to the divesting of titles to movables lawfully acquired and held by our general and statute law, without the assent or intervention and against the will of the owner, by our law. Notions of propriety are slight when a *bona fide* purchase of stolen goods gives a good title against the original owner: *Per Kent, C. J., in Wheelright v. Depryster*, 1 Johns. 470. We are not required to show comity to that extent; especially as it is to our citizens alone that we are administering justice." In some states, possession of the mortgaged property by the mortgagor after maturity of the mortgaged debt does not invalidate the mortgage. And a mortgage duly executed in one of those states was held valid in Illinois, where the property was taken there by the mortgagor in possession, against a creditor of the mortgagor, notwithstanding the law of Illinois that possession in the mortgagor would be fraudulent *per se* as to the mortgagor's creditors, had the mortgage been executed there: *Mumford v. Canty*, 50 Ill. 370. So a mortgage of personal property made by a citizen of one state temporarily in another state with such property, if valid by the law of the place where made, is valid in the former state against the creditors of the mort-

gagor who afterwards find the property in the former state in the mortgagor's possession: *Langworthy v. Little*, 12 Cush. 109.

3. *Lex Situs Governs* when a mortgage is executed in a state other than that in which the property is situate. Though it be executed according to the requirements of the law of the domicile of the owner in another state, the mortgage will be invalid as against attaching creditors in the state where the property is located, unless the mortgage conforms to the laws of the latter state. The mortgage, to be valid, must be executed, acknowledged, and recorded according to the law of the place where the property is at the time. This, however, is not properly included in the scope of this note; but as it is so intimately connected with it, a few authorities will be cited illustrating the whole doctrine, and reflecting some light upon the subject of the note at large: See *Green v. Van Buskirk*, 7 Wall. 139, overruling S. C., 2 Keyes, 119; *Golden v. Cockril*, 1 Kan. 259, reviewing the cases, citing the principal case, and distinguishing it from the one at bar; *Denny v. Faulkner*, 22 Id. 89; *Edgerly v. Bush*, 81 N. Y. 199; *Clark v. Tarbell*, 58 N. H. 88; *Hardaway v. Semmes*, 38 Ala. 657; *Ames Iron Works v. Warren*, 76 Ind. 512; *Guillander v. Howell*, 35 N. Y. 657; *Whitman v. Conner*, 40 N. Y. Super. Ct. 339; *Runyon v. Groshon*, 12 N. J. Eq. 86; *Rice v. Curtis*, 32 Vt. 460; *Martin v. Potter*, 34 Id. 87.

4. *Exception to General Rule* prevails in those states which have not adopted the policy of recording chattel mortgages. For instance, a chattel mortgage is wholly unknown to the laws of Louisiana, and the courts of that state do not feel bound by the comity of nations to enforce a mortgage upon personal property made in another state: *Delop v. Windsor*, 26 La. Ann. 185. So in Pennsylvania, where the rule of the common law prevails, by which a sale or mortgage of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of creditors and purchasers, it is held that, while a mortgage made in another state and duly recorded there, so that it is valid there without any delivery, might be enforced by the courts of Pennsylvania as between the parties, these courts would not enforce such a mortgage as against a creditor or purchaser who had acquired rights in the property after it had been removed to that state: *MacCabe v. Blymyre*, 9 Phila. 615. In this case it was said, *per Hall, J.*: "By the comity of nations, as a general rule, a contract valid where it is made is valid everywhere, and the law of the place of the contract controls as to the construction of it. Without this rule, there could not safely be commercial or business intercourse between citizens of different nations. But the laws of a nation or state have not, *ex proprio vigore*, any binding force beyond the limits of its territory. Any effect they have is *ex comitate*. And the judicial tribunal in Pennsylvania must determine how far comity is to be permitted to interfere with the domestic interests and policy of the state. As between the parties to the chattel mortgage, Pennsylvania courts could safely enforce the validity of the mortgage, and would do so. There would be no public interest or policy of law that would require us to hold the bill of sale or mortgage void, as between the parties to it, for want of delivery of possession of the chattel. But it would be an extraordinary stretch of comity that would induce a court here to hold that a Maryland chattel mortgage shall be made the means of defrauding our own citizens. Either the *lex rei sitæ* must prevail over the *lex loci contractus*, or we must open a wide door for fraud, to the detriment of citizens on both sides of the border. Would it be reasonable to require that the defendant should have first ascertained where this migratory doctrine came from, and then have had the records of all the courts in Maryland searched for chattel mortgages? Or is it fairer to hold that the mortgagees,

by allowing the mortgagor to retain possession of the horse and bring it into Pennsylvania, and exercise notorious acts of ownership, lost their rights under the mortgage as against an intervening Pennsylvania creditor or purchaser. No people are bound to enforce a contract in contravention of their public law and policy. Whilst a lien created by the *lex loci* will generally be enforced wherever the property may be found, yet this is not necessarily so in preference to claims arising under the *lex rei sitæ*. The comity extended to the *lex loci* must yield to the positive law and public interests of the place where the remedy is sought."

5. *Equitable and Statutory Protection of Mortgagee's Rights—Statutes Relative to Recordation of Mortgages.*—A provision is frequently inserted in mortgages to the effect that if the mortgagor attempts to sell or remove the mortgaged property without the written consent of the mortgagee, the latter may take immediate possession of it. A protectory provision is also sometimes inserted, enabling the mortgagee to take possession whenever he may deem it necessary for his protection, even before the maturity of the mortgage debt. Again: equity has jurisdiction in such cases, before default, or before the mortgagee can proceed at law to interfere and restrain the removal of mortgaged chattels beyond the jurisdiction of the court. But the mortgagor is not to be hindered in the legitimate use of the property, and a mere temporary removal of it out of the state, accompanied by an honest intention to return it before the maturity of the debt, and without any intention to defeat the rights of the mortgagee, will not authorize the interference of a court of equity. Thus if a mortgagor drive a horse and wagon, the subject of the mortgage, into a neighboring state, for the purpose of making a brief visit, with the manifest intention of returning before the law day of the mortgage, there is no ground for equitable interference, without further proof that the rights of the mortgagee will be defeated by such removal: *Walker v. Raulford*, 67 Ala. 446. It is easy to see from this and similar cases that the rights of the mortgagee might be defeated by the mortgagor's change of heart while temporarily within the domain of a foreign jurisdiction. A new intention never to return might be born. So, in addition to protectory clauses in the mortgage, and the right to protection in equity, it has been found necessary to protect him by general enactments respecting the removal, concealment, and sale of the mortgaged property by the mortgagor. These statutes are penal in their nature, and make the removal or sale of mortgaged property, without the consent of the mortgagee, a criminal offense, punishable by fine or imprisonment. These statutes throw a safeguard around business transactions and commercial intercourse. These statutes are given in full for each state in Jones on Chattel Mortgages, secs. 602-631. If no effectual record of the mortgage can be made under the statute, the mortgagee must protect himself by taking and holding actual possession of the property. Such is the case where the mortgagor resides out of the state, and the statute provides for the recording of the mortgage at the mortgagor's place of residence, but does not provide for recording it in the place where the mortgaged property is situated: *Smith v. Moore*, 11 N. H. 55. A statute which requires a mortgage on property brought from another state to be recorded within a limited time, and on failure of such record makes such property liable to the debts of the person in possession, but is silent as to purchasers, does not make invalid as to the latter a mortgage valid in the state where it was executed. In the absence of any express provision of the statute invalidating such mortgages as to purchasers, it is the duty of the court to infer that the legislature did not intend to change the law as to them: *Beall v. Williamson*, 14 Ala. 55. A

statute relating to the recording of mortgages has no application to a mortgage made outside the state, unless expressly made so, though the property be afterwards brought within the state: *Fairbanks v. Bloomfield*, 5 Duer, 434; and the fact that a citizen of the state made such a mortgage while temporarily absent in another state with the property does not alter the matter: *Langworthy v. Little*, 12 Cush. 109. If the mortgage be duly recorded in the state where it was executed, and the mortgagor afterward take the property with him into another state, no recordation of the mortgage in the latter state is necessary, unless made so by positive statute of the latter state: *Beall v. Williamson*, 14 Ala. 55; *Offutt v. Flagg*, 10 N. H. 46. In Michigan, under a statute making no provision for the recordation of a non-resident's mortgage, an effectual mortgage can only be made by the mortgagee's taking possession: *Montgomery v. Wight*, 8 Mich. 143. In that state it is held that a mortgage executed and recorded in another state is not valid against the claims of attaching creditors, when the property has been removed to that state. The rule in that state is an exception to the general rule that a mortgage, valid by the laws of the state where it was executed, and where the property was at the time, is valid in any other state to which the property may be removed, without further registration, unless the laws of such other state require the recordation of the mortgage in that state when the property is removed to it: *Id.*

6. *Lex Fori, Evidence, Presumption, Pleading.*—The remedies upon a mortgage executed in another state or country are determined by the *lex fori*. Remedies upon such chattel mortgages are regulated exclusively by the laws of the state to which the property is removed, and in which the creditor seeks to enforce his rights, or any party in interest seeks to pursue any claim against the subject-matter. The *lex fori* determines whether such mortgaged property is subject to attachment, and also the proper mode of proceeding in making the attachment: *Ferguson v. Clifford*, 37 N. H. 86. In determining whether a mortgage was executed according to the laws of a foreign state, those laws must be proved as facts by evidence addressed to the court, and not to the jury: *Id.* A chattel mortgage is presumed to have been executed in the state where it is sought to be enforced until the contrary appears: *Franklin v. Thurston*, 8 Blackf. 160; *Hutchins v. Hanna*, 8 Ind. 533. But there can be no such presumption when the mortgage purports to be executed in another state: *Blystone v. Burgett*, 10 Id. 28. And if the mortgagee relies upon the statute of a foreign state to establish the validity of his mortgage, it must be specially pleaded: *Id.*; *Shaw v. Wood*, 8 Id. 518.

MARSH v. STEPHENSON.

[7 OHIO STATE, 264.]

DISPOSITION OF SURPLUS LAND WHERE CALLS OF DEED DO NOT INCLUDE ALL LAND INTENDED.—Under an order of chancery, the several lots of a block of land were sold to different persons, the conveyances being similar in form, and referring to a recorded plat for description. The descriptions in the deeds by metes and bounds did not call for so much land as the block contained, though the recorded map showed the whole block was intended to be included. *Held*, that the surplus land should be ratably apportioned among the grantees.

TRESPASS. Block No. 8 of Cincinnati was composed of sixteen lots lying in two tiers, the northern one being numbered from one to eight, and the southern one from nine to sixteen. The lots were sold at public auction, under an order made in a proceeding in chancery. Marsh purchased lots 8, 15, and 16, and Stephenson the others. The sale was confirmed and a deed made to Stephenson May 21, 1838, and to Marsh on May 28, 1838. The lines were not staked out, but the corners of the block were known, and the lots were described by number and as fronting fifty feet on the street, except Nos. 8 and 16, which fronted twenty-five feet, and seventy-nine feet eight inches respectively, owing to the block being trapezoidal in form, the streets on the sides of the block not running parallel. The deeds also referred to a plat on file for further description. The block upon actual measurement proved to have about ten feet more frontage than either the calls of the deed or the plat on file called for. Stephenson took possession of three hundred feet frontage, but afterwards learning of the surplus brought ejectment against Marsh for the land described in the deeds to him. Marsh, though served with notice, did not enter into the consent rule, and Stephenson obtained judgment. Marsh had put up a fence where Stephenson had first fixed his line, and the latter, claiming possession under the judgment obtained by him, moved the fence to a distance three hundred and seven feet and three inches from the corner. Whereupon Marsh brought an action of trespass. Upon the trial in the common pleas, the court held that Marsh was entitled to all the surplus, but upon error this judgment was reversed by the district court. The present petition in error seeks to reverse this judgment.

Caldwell and Paddock, and R. B. Warden, for the plaintiff in error.

Fox and French, for the defendant in error.

By Court, Soorr, J. If Marsh, the plaintiff, is entitled to hold all the surplus ground in square No. 8, then the district court erred in reversing the judgment of the common pleas; but if he is not entitled to any of it, or only to a *pro rata* share of it, then the judgment of the district court must be affirmed; for it is not claimed that Stephenson, by the alleged act of trespass, appropriated more than the *pro rata* share of the surplus. The testimony shows that Stephenson has only occupied to a line three hundred and seven feet three inches east of Cutter street, and that between this line and John street, Marsh has in

his possession one hundred and thirty-two feet nine inches. Is he entitled to more? We have no doubt either as to the law or equity of this case. Neither of the parties acquired a right superior to that of the other in respect to this surplus, by their deeds, by the recorded plat referred to in their deeds, or by the description accompanying the return of the appraisement of the several lots, made by the sheriff and freeholders prior to the sale.

In all these evidences of title they stand on an equal footing. The description in the appraisement gives to each of Stephenson's lots 9, 10, 11, 12, 13, and 14, a front of fifty feet on the north side of Clinton street, making in all a front of three hundred feet; and also gives a definite location to these lots by a reference to a fixed monument, to wit, the north-east corner of Clinton and Cutter streets.

The same description gives to Marsh's lot No. 15 a front of fifty feet, and to No. 16 a front of seventy-nine feet eight inches, on the north side of Clinton street, making an aggregate front of one hundred and twenty-nine feet eight inches, and gives to the premises a definite location by bounding them on the east by John street, an equally fixed monument. The plat gives to each of Stephenson's lots a width of fifty feet; and to Marsh's lot 15 the same width of fifty feet; and to 16 a width of seventy-nine feet eight inches. The lots were all sold by numbers, at the same time, by reference to the plat; and, as would seem from the evidence of the sheriff, were each sold as being of the width indicated by the plat, more or less. The deeds, executed by the sheriff to the parties, are similar; they each describe the lots by numbers and by reference to the same plat; they each assign to the several lots the width or front indicated by the plat, with the addition of the words "more or less."

The plat includes all the ground between Cutter and John streets, and there can be no doubt that it was all intended to be sold.

There were no stakes fixing the division lines of the lots, and the words "more or less" in the deeds, together with the face of the plat, render it certain that the whole was intended to pass by the sale and conveyance. Under these circumstances, it would seem equitable that the surplus should be ratably apportioned between the grantees. And to this effect are the authorities: *Lincoln v. Edgecourt*, 28 Me. 279; *Brown v. Gray*, 3 Id. 129. If the quantity falls short, each grantee must sustain his portion of the loss: *Wyatt v. Savage*, 11 Id. 431. The same prin-

ciple has been settled in *Wolfe v. Scarborough*, 2 Ohio St. 363. And the manifest equity of the rule must command approbation.

But were it otherwise—if Stephenson takes nothing by his deed but the three hundred feet represented on the plat—the same rule must limit the plaintiff Marsh to one hundred and twenty-nine feet eight inches, for he stands on the same ground, and must be governed by the same plat. This would give the surplus to Betts, and would be equally fatal to the plaintiff's claim.

We are unable to see, either in the trapezoidal form of lots 8 and 16, or in the numbering of the lots from west to east, any substantial reason for changing the equitable rule. The same rule of construction must be applied to the deeds of each party.

It is unnecessary, therefore, to inquire how far the claim of Stephenson was strengthened by the proceeding in ejectment.

Judgment of the district court affirmed.

BARTLEY, C. J., and SWAN, BRINKERHOFF, and SUTLIF, JJ., concurred.

DEEDS ARE TO BE CONSTRUED MOST STRONGLY AGAINST GRANTOR for the benefit of the grantee: *Budd v. Brooke*, 43 Am. Dec. 321, and note 339; *City of Alton v. Illinois T. Co.*, 52 Id. 479. And, as in the principal case, the court must construe a grant so as to effectuate the intention of the parties, provided the terms used in it will admit of such a construction: *Budd v. Brooke*, 43 Id. 321, and cases cited in note thereto 339. And where the words "more or less" were used in a deed, as in the principal case, and the quantity of land was described as "containing by deed two hundred acres, be the same more or less," and it appeared from a subsequent survey that the tract contained three hundred and fifteen acres, it was held that parol evidence was inadmissible to prove that the parties intended a sale of a less quantity than the entire tract: *Dale v. Smith*, 12 Id. 64.

JOHNSTON v. CLEVELAND AND TOLEDO R. R. Co.

[7 OHIO STATE, 336.]

ADMINISTRATOR MAY MAINTAIN ACTION FOR BENEFIT OF NEXT OF KIN OF DECEASED, under statute of March 25, 1851, entitled "An act requiring compensation for causing death by wrongful act, neglect, or default," and giving a right of action for the exclusive benefit of the widow and next of kin; although deceased leave no widow or children, and though the petition do not contain a statement of special circumstances rendering the death a pecuniary injury to such next of kin. Such special circumstances affect only the amount of the recovery.

DEMURRER to petition. The facts are stated in the opinion.

M. R. and R. Waite, for the defendant, in support of the demurrer.

Commager and Lemmon, for the plaintiff.

By Court, SCOTT, J. This case, by the reservation of the district court, comes before us on demurrer to the plaintiff's petition, which reads as follows:

"David Johnston comes and says he is the administrator of David Lyons, late of said county of Lucas, deceased, duly appointed according to law; that said David Lyons, while in life, to wit, on the thirtieth day of January, 1855, and before that time, was in the employ of the Cleveland and Toledo Railroad Company, the defendant aforesaid, in the county of Lucas aforesaid, and on the day and year aforesaid was employed as a laborer in the employ of said company on the steam ferry-boat, then and there used by said defendant in connection with the railroad of said defendant, in the carriage and transportation of passengers and freight across the Maumee river at Toledo; and while said David Lyons, now deceased, was so engaged under the directions of the agents and superintendents of said defendant, the said David Lyons, by the wrongful act, neglect, and default of the said agents and superintendents of the defendant aforesaid, while they were concerned in managing and conducting the business of said defendant, was bruised and mangled by the machinery of said boat, and was thereby thrown into the water, and he, the said David Lyons, became and was drowned, and so the plaintiff says the death of said David Lyons was caused by the wrongful act, neglect, and default of said defendant, and without the fault of said Lyons.

"And the plaintiff further says that Thomas Lyons, Maurice Lyons, Catharine Mulverhill, Cornelius Lyons, Margaret Lyons, Ann Lyons, and James Lyons are next of kin and brothers and sisters of said David Lyons, deceased; the said David Lyons, leaving no widow, and having no children or child, left the said brothers and sisters aforesaid the heirs at law of him, the said David Lyons, deceased; and that they, the next of kin of him, the said David Lyons, deceased, have suffered damages, by reason of the aforesaid wrongful act, neglect, and default of the said defendant, its servants and agents, in the sum of five thousand dollars. Wherefore the plaintiff says he has a right to recover said sum of five thousand dollars, and asks judgment therefor."

The action is founded upon a statute of this state, entitled

"An act requiring compensation for causing death by wrongful act, neglect, or default," passed March 25, 1851, which is in the following terms:

"Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof; then and in every such case the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

"Sec. 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death, to the wife and next of kin to such deceased person; provided, that every such action shall be commenced within two years from the death of such deceased person:" Swan's R. S. 707, 708.

The question presented by the demurrer is whether, under this statute, an action can be maintained for the sole benefit of the brothers and sisters of a deceased person who leaves no widow, without an allegation in the petition of such special circumstances as would render the death a pecuniary injury to them.

A right of action is given by this statute to the personal representative of the deceased, merely as a trustee, and for the exclusive benefit of the widow and next of kin. Hence it would seem to be clear that in order to the maintenance of the action there must be a widow or next of kin to whom the amount recovered could be distributed. And so it was held, under a similar statute of New York, in *Lucas v. N. Y. Cent. R. R. Co.*, 21 Barb. 247.

But if there be persons in whom the beneficial interest in the judgment to be recovered can vest, then the only other conditions to which the right of action is subjected by the terms of

the statute are: 1. That the death shall have been caused by such wrongful act, neglect, or default, as would, if death had not ensued, have entitled the party injured to maintain an action against the defendant, and recover damages in respect thereof; 2. That the action be brought by and in the name of the personal representative of the deceased; and 3. That it be commenced within two years from the time of his death.

Subject to these conditions, the statute gives a right of action; and seems to regard the widow and next of kin as sustaining at least a nominal pecuniary injury, in all such cases, from the wrongful act of the defendant: *Quin v. Moore*, 15 N. Y. 432.

Questions may arise upon the trial of this cause as to the construction of the rule of damages furnished by the second section of this statute; but no such questions are properly before us. The question raised by the demurrer does not relate to the amount of the recovery, but is, simply, Can an action be maintained on the case stated in the petition? We think it can.

Demurrer overruled.

BARTLEY, C. J., and SWAN, BRINKERHOFF, and SUTLIFF, JJ., concurred.

LOCKWOOD v. MITCHELL.

[7 OHIO STATE, 387.]

CONTRACT TO PAY MONEY, MADE AND TO BE PERFORMED IN NEW YORK, will be governed by the laws of that state relating to usury, although the loan is secured by a mortgage upon lands in Ohio.

ALLEGATIONS AND PROOF THAT WRITTEN CONTRACT IS NOT USURIOUS, where it appears to be so, must be explicit, and clear of all doubt.

EXCESS OF INTEREST PAID UNDER USURIOUS CONTRACT MAY BE APPLIED in payment of interest afterward accruing, where usury is pleaded and proved, but forfeiture of the loan is not prayed for.

EFFECT OF FORECLOSURE SALE SUBORDINATE TO PRIOR CONTRACT.—A contract was made by which it was stipulated that a foreclosure and sale should be had; that such sale should not operate as a satisfaction, nor divert the lien; that the purchase money should not be applied to pay the mortgage debt; and that the purchaser should take the land in trust to sell, and thus pay off the mortgage debt: *Held*, that the decree and sale made pursuant to such contract must be regarded as part of the contract, and subordinate to it.

CONTRACT OF ONE ACTING WITHOUT AUTHORITY FOR INSANE MORTGAGOR is not obligatory upon him. A decree made pursuant to such a contract may be valid and operative as to innocent third persons, but the purchaser with notice will hold in trust for the insane mortgagor.

WHERE SUIT IMPEACHING MORTGAGE DEBT FOR USURY IS DISMISSED UNDER UNAUTHORIZED CONTRACT, and in prejudice of an insane mortgagor's rights, there being in fact usury in the transaction, the trustees of the lunatic, upon being required to account to the mortgagor for the principal and interest, are entitled to a credit of all excess of interest paid beyond the lawful rate.

CONTRACT MADE BY REPRESENTATIVES OF DECEASED PARTNER, without authority, and touching matters over which the surviving partner had entire control, will be considered as wholly inoperative to affect the rights and estate of the firm when it is declared inoperative as to the surviving partner.

CHANCERY. George and Ralph Lockwood were partners doing business in Milan, Ohio. In 1836, being financially embarrassed, they entered into a contract with Mitchell and Crawford, residents of New York, agreeing to pay said Mitchell and Crawford four hundred dollars if they would procure a loan of eight thousand dollars to said Lockwoods. The loan was made by Mitchell and Crawford themselves, the money advanced in New York, and a mortgage taken by them on certain lands owned by the Lockwoods in Ohio. Interest was paid to April 1, 1842. Ralph Lockwood died in 1838. George Lockwood became insane shortly after, and his son, James C., in 1843 sent him, without judicial authority, to the lunatic asylum. Meanwhile Mitchell had brought several ejectment suits to recover the mortgaged premises, and George Lockwood had employed Le Grand Marvin, an attorney of New York, to file a bill in chancery, alleging the note and mortgage to be usurious and void. An injunction was granted, and a motion to dissolve it made, but was not pressed to a hearing. In this condition of affairs, Mitchell and Crawford entered into a contract, which was denominated a family contract, with James C. Lockwood, who was attending to his father's business without any legal authority. The substance of this contract is stated in the opinion. Pursuant to this, the actions in ejectment and suit in chancery were dismissed, the mortgage then in James C. Lockwood's hands foreclosed, and the property bid in by James C. Lockwood. James C. then sold a portion of the land to Mitchell and Crawford in 1846. The land had greatly increased in value, and they sold a portion of the lots conveyed to them for fourteen thousand dollars, much more than the amount loaned, with interest. In 1845 George Lockwood, his faculties still in the same unsound condition, was discharged from the asylum. In 1849 he filed a bill in the court of common pleas, setting forth the facts stated, and declaring the four hundred dollars paid to Mitchell to be a usurious

advancement, and that the sale made under the family contract was void. Mitchell and Crawford alleged the contract to be honest, and stated reasons for the advancement of the four hundred dollars, which appear in the opinion. The court dismissed the bill of George Lockwood, and a petition in error in the nature of a bill of review was filed in this court, which reversed the decree of the district court, and retained the cause for further hearing and decree.

Homer Goodwin and C. P. Wolcott, trustees, for the complainant.

S. F. Taylor, for James C. Lockwood.

W. F. Stone and N. H. Swayne, for Mitchell and Crawford.

S. T. Worcester and Le Grand Marvin, for the executors and heirs of Ralph Lockwood.

Ebenezer Andrews, for the other defendants.

By Court, SWAN, J. 1. Was the loan of eight thousand dollars, in respect to the question of usury, to be governed by the laws of New York or of Ohio? The contract for the loan was made in the state of New York; the money was advanced there, the note and mortgage delivered there, and the loan was to be repaid there. The fact that one of the incidents of the debt consisted of a lien, by way of mortgage, upon lands in Ohio, to secure payment, does not change the law in this respect. It was a contract not only made but to be performed in the state of New York, and must be governed by the laws of that state.

2. Was the loan usurious? Four hundred dollars, being five per cent on the loan, was paid to Mitchell. What was the consideration of this? The written contract of March 17, 1836, given above, states substantially that it was in consideration that Mitchell would advance and loan to the Lockwoods eight thousand dollars at a future day. On the face of the contract, and by its terms, the four hundred dollars was an open and undisguised gratuity for the loan of money over and above the seven per cent interest on the loan. Mitchell, in his answer, denies this, and assigns the usual reasons which lenders give for withholding a loan from an unfortunate borrower; bank bills in Westchester county were not worth as much as money in the city of New York; the difference, together with the trouble of converting bank bills current in Westchester into funds current in New York was at least one per cent; that the Lockwoods would make a considerable profit on the loan when they received it, by

the difference in exchange between New York and Ohio; that George Lockwood assured Mitchell that by the laws of Ohio he might take what he pleased for the loan and recover. Such reasons as these, especially the last, for taking the bonus of four hundred dollars, only confirm in our minds the belief that the terms of the contract truly state the consideration of the four hundred dollars, and throw so much suspicion over the only plausible reason given in the answer, to wit, a compensation for looking to and changing securities, that we have had no hesitation in coming to the conclusion that the transaction is tainted with usury. It would require a clear, distinct, and sufficient consideration for the payment of the four hundred dollars to be alleged and proved, to overcome the usurious consideration stated in the written contract. Instead of this, parts of the consideration alleged are no consideration at all. No means of determining the value of the others are alleged. The trouble and vexation of taking the note and mortgage, or drawing his check for the eight thousand dollars, might as well have formed a part of the consideration as some of those stated by Mitchell.

3. As to the effect of the loan being usurious. The complainant has so shaped his bill and prayer for relief that, while he claims that the contract was tainted with usury, he does not set up the statute of New York for the purpose of avoiding the payment of the loan, but simply claims that the excess of interest was paid without consideration, and prays that such excess may be applied as payment on the interest.

We perceive no objection to a party thus consenting to do equity, and at the same time requiring a credit for the excessive interest. No objection to this is made, or can be made, by the defendants.

4. The real difficulty in this case to determine the effect upon the rights of George Lockwood, of the family contract, decree, and sale to James C. Lockwood, under the mortgage, and the conveyance by him to Mitchell.

At the time that contract was entered into Mitchell was enjoined from further prosecuting his claim, on the ground that it was usurious. His hands seem to be tied, and with a fair prospect of losing both principal and interest. In this condition of things he procured a meeting of the friends of George Lockwood, who was then in the asylum, and they entered into the family contract.

Two objects seem to have been in view. Mitchell desired to avoid the question of usury, and to get rid of the pending in-

junction. James C. Lockwood desired to obtain such a control of his father's property as that it might be sold to pay debts. Proceedings under the mortgage were therefore provided for by James C. Lockwood, not for the purpose, by sale under a decree, to pay the mortgage debt, but to vest the legal title of the mortgaged premises in him. And these proceedings under the mortgage were consented to by Mitchell, not for the purpose of asserting his lien upon the mortgaged premises, and by decree creating a fund for the payment of the debt, for he was not to be paid by a sale under the decree, nor was he to enforce his lien by an order of sale; his object was to have his debt recognized, and get rid of the chancery suit in New York. To attain these results, it was agreed that the chancery and ejectment suits should be discontinued; that the amount of the loan and interest be restated; that James C. Lockwood should prosecute to foreclose the mortgage made by George and Ralph Lockwood to Mitchell and Crawford; that James C. Lockwood should bid off the premises, but should pay nothing as purchaser; that Mitchell and Crawford, however, should follow a part of the land into the hands of James C. Lockwood to secure the mortgage debt, the latter holding the premises as trustee for Mitchell and Crawford, and selling and accounting for proceeds of sales and of rents to pay the mortgage debt.

This was a very ingenious mode on the part of Mitchell of defeating the claim of usury set up by George Lockwood, the lunatic; and a very ingenious mode on the part of James C. Lockwood to divest his father of the legal title to his real estate. In the first place, let us ascertain what effect the family contract had upon the decree.

A decree of foreclosure ordinarily bars the right of the mortgagor to redeem by payment of the mortgage debt; a sale is made under the decree to satisfy the mortgage debt; the purchaser at such sale takes the title, unincumbered by the mortgage debt, and cleared of all claim of the parties to the mortgage. But in the case before us, even if we treat the family contract as obligatory upon George Lockwood, the decree of foreclosure did not operate to bar the equity of redemption, for it is clear that the moment James C. Lockwood purchased and obtained title under the decree as trustee, to pay the mortgage debt, George Lockwood might, notwithstanding the decree, have then tendered to James C. Lockwood, the trustee, and Mitchell and Crawford, the amount of the mortgage debt, and enforced a reconveyance of the premises.

Nor was the sale to James C. Lockwood under the decree made for the purpose of satisfying the mortgage debt, for James C. Lockwood was not to pay anything on his bid, nor was his bid to be credited upon the decree. Nor was the purchaser to take the title unincumbered by the mortgage debt, or cleared of the claims of the parties to the mortgage. The debt was to stand and follow the premises, notwithstanding the sale. This decree, therefore, as a decree of foreclosure, was made inoperative as such by the terms of the family contract. That such a contract, if entered into by the parties to a decree, or their authorized agents, would be valid, and that a court of chancery would enforce it and make the operation of the decree subordinate to the stipulations of the parties, we entertain no doubt.

The prosecution of the suit on the mortgage, the amount of the decree, the decree itself, the sale thereunder, and the rights and estate acquired thereby, were inseparable parts of and subordinate to the stipulations of the family contract.

George Lockwood was not a party to this family contract, and no one was authorized to act for him. The family contract being unauthorized and void as to him, and the decree having been procured in consideration of the stipulations of the contract, and, indeed, forming a part of it, what shall be the operation and effect of the decree? Not, certainly, as a bar to George Lockwood's right to redeem, for that would be giving it, as we have seen, a more stringent effect than if the family contract had been authorized by him, and an effect, too, which Mitchell and Crawford did not contemplate. Nor is it necessary, in order to protect the rights of George Lockwood, that the decree, or the sale thereunder, should be impeached for fraud or error, or that the legal title acquired under the decree by James C. Lockwood or Mitchell should be pronounced invalid. But we cannot, under the facts, do less than hold James C. Lockwood and Mitchell to be trustees of the estate of George Lockwood, liable to account to him for sales, and the premises unsold, and George Lockwood liable to account to Mitchell and Crawford for the real amount of the mortgage debt. By thus holding, we recognize the decree as valid and operative as to third persons, protect the just rights of Mitchell and Crawford under their mortgage, and treat the decree as so inseparably connected with the stipulations of the family contract as not, in its operation and effect, to conclude the rights of George Lockwood as against the parties to that contract.

5. As to the disposition of the usurious interest. One of the

objects which this family contract was intended to effect, and did effect, was the dismissal of the suit in New York, brought to impeach the mortgage debt for usury. The family contract being unauthorized and void as to George Lockwood, the dismissal of that suit being also unauthorized and to the prejudice of the rights of the insane mortgagor—there being in fact usury in the transaction—the trustees of the lunatic being now required to account to Mitchell and Crawford for the principal and interest, are entitled to at least credit the excess of interest beyond the lawful rate as claimed in the bill.

6. As to the relation of the representatives of Ralph Lockwood to the surviving partner and to the decree in his favor. George Lockwood, as surviving partner of the firm of George and Ralph Lockwood, was vested with the entire estate and control of the property of the firm. The representatives of Ralph Lockwood had no such distinct interest or authority, in selling the debts of the partnership or disposing of its estate, as would authorize us to enforce their agreement, to the prejudice of the authority or the rights of George Lockwood as surviving partner. We cannot separate the unauthorized contract of the representatives of Ralph Lockwood in relation to the debts and estate of the firm and enforce them against such representatives, and at the same time vindicate the rights and authority of George Lockwood as surviving partner. The rights of the representatives of Ralph Lockwood must therefore be controlled by and follow the rights of George Lockwood. There may be cases in which the rights of a surviving partner and of the representatives of a deceased partner may be concluded by the contracts of the latter; but this is not such a case. Here the representatives, as such, were dealing with a contract and an estate over which they had no control, and in such a manner as directly to impair the rights and affect the authority of the surviving partner.

This case will be referred to a master, to state an account in accordance with the views above indicated.

BARTLEY, C. J., and BRINKERHOFF, SCOTT, and SUTLIFF, JJ., concurred.

LEX LOCI CONTRACTUS GOVERNS CONSTRUCTION OF CONTRACTS, unless another place is appointed for their performance: See notes to *Kanaga v. Taylor*, ante, p. 62, containing reference to collected cases. So law of state where bill of exchange is made will, if parties are silent, fix the rate of interest which it is to draw: *McAllister v. Smith*, 65 Am. Dec. 651. Any rate of interest authorized by the *lex loci contractus* or *lex loci solutionis* will be recognized and

enforced in the courts of other governments whose laws would otherwise make such rates of interest usurious: *Id.* Evasions of usury laws are not countenanced, and when courts detect them, they will withhold any aid to those who make foreign contracts a pretense for exacting usury at home: *Id.* Agreement made in New York to be executed there must be governed by the laws of that state, and if by those laws the same would be usurious and void, it will be so held in Louisiana: *Clague v. Creditors*, 20 *Id.* 300.

THE PRINCIPAL CASE WAS CITED in *Conway v. Duncan*, 28 Ohio St. 105, to the point that it is a settled question that a judgment can be impeached for fraud.

NEEDLES'S EXECUTOR v. NEEDLES.

[7 OHIO STATE, 432.]

STATUTORY PROVISION AS TO ADVANCEMENTS HAS NO JUST APPLICATION, where the testator distributes his property with the intention of disposing of it all, but inadvertently leaves a residuum by omitting to put any residuary clause in his will.

HUSBAND'S ASSIGNMENT OF WIFE'S REVERSIONARY INTEREST ONLY TRANSFERS to the assignee the right which the husband had; and he takes nothing unless the husband survive the wife, or the reversionary chose in action is reduced to possession during coverture.

EXPECTATION OR HOPE OF SUCCEEDING TO ANCESTOR'S PROPERTY IS MERE OR REMOTE POSSIBILITY, in which there is no existing right that can be the subject of release.

EXECUTORY CONTRACTS MADE TO CONTROL DISTRIBUTION OF MAN'S ESTATE after his death are not binding.

ADVANCEMENT TO SON, IN FULL OF ALL CLAIMS AGAINST ESTATE of the father, will not, after his death, prevent the son taking, as heir, a residuum not disposed of by will.

PETITION for distribution of assets. Philemon Needles had eight children, Lucinda, Rebecca, Anna, Rachael, Amy, James, Enoch, and John. The first four named were married and had received sums amounting to about two thousand dollars each from their father, and in accepting such sums had signed an instrument acknowledging the receipt, and agreeing not to set up any further claim against his estate after his death. These receipts were signed by the husbands also. Lucinda and the husbands of Rebecca and Anna died. Philemon Needles then died. He left a last will and testament, by which he gave certain legacies. The will contained no residuary clause. After paying the debts and legacies, there remained eight thousand dollars in the hands of the executor. The first four heirs above named, or their representatives, claimed that this sum should be equally distributed among the eight. The last four claimed the whole, on the ground that the agreement signed by the first

four barred them from any further share in the estate. The petitioner asked an order directing him as to his duty in the premises.

Swayne and Baber, for the petitioner.

John W. Andrews and Henry Stanbery, for the children against whom the releases were set up.

P. B. Wilcox, for the four children who claimed the whole overplus.

By Court, BARTLEY, C. J. The first inquiry suggested by facts of this case is, whether the several gifts or donations made by Philemon Needles to his four sons-in-law, for which he took the several receipts in question, can be treated as advancements under the statutory regulation on that subject in this state.

It was held in the case of *Putnam's Adm'r v. Heirs of Putnam*, 18 Ohio, 347, that the former laws of this state regulating descents and distributions of personal estates provided for advancements as to real, but not as to personal, property. And this construction, although stringent and resulting in unjust and unequal distribution of estates, was affirmed by several decisions made afterwards. The difficulty was, however, removed by legislation, and the statute now in force applies the rule in relation to advancements to estates, personal as well as real: Ohio R. S. 323, sec. 10. The provision, however, as to advancements applies only in case of intestacy. True it is, Philemon Needles died intestate as to the residuum of his estate now sought to be distributed. But it is apparent from the provisions of his will that he designed and manifestly supposed that he had made a disposition of his whole estate. He made bequests to all his children, severally, in various amounts, and even anticipated a supposed residuum of three hundred dollars in his distribution. The several advancements which had been made to his four sons-in-law, for which he had taken their said receipts, must have been in his contemplation when he made his will. How much he had previously advanced to his other children does not appear in this case. But it is fair to presume that in view of all his previous advancements he made such a distribution of his property by his will as he deemed just and proper. In such a case, therefore, although the testator had, unexpectedly and beyond his own anticipation, died intestate as to a residuum of his estate, the statutory provision as to advancements could have no just application; and

whether it could apply to any case of partial intestacy, where the testator knowingly and designedly made a testamentary disposition of only a part of his property, it is not necessary to consider in this case.

It is insisted, however, that the interest in expectation, or hoped for inheritance of the daughters Rachal, Anna, Rebecca, and Lucinda, from their father's estate, was released by their several husbands, by virtue of the instruments of writing executed by them, respectively, to the father, whereby each acknowledged the receipt of the advancement made, and agreed with the father not to set up any further claim against his estate as one of his heirs after his decease. And this presents the question of the power of the husband to release the wife's bare possibility or expectation of inheritance from her ancestor.

One of the daughters, Lucinda, and two of the sons-in-law, Dailey and Gray, died before the death of the ancestor, and therefore before any actual right or interest could have vested in the wife by inheritance. The wife of George Dailey, and the wife of Thomas Needles, respectively, united with their husbands in signing the receipts. This, however, cannot affect the question, or give any legal vitality to the instruments if they had none without it. If the husband had the power to release, or by contract to bar, this mere expectancy of the wife, it was by virtue of his right and control over his wife's personal estate, and not by means of the wife's consenting thereto. It may be that in a disposition of, or an arrangement in regard to, a wife's property by the husband, made with a view to the wife's separate use or advantage, the consent of the wife might, in a court of equity, be treated as a material element in the transaction; but in the release or assignment of the wife's choses in action by the husband for his own interest, the wife's uniting with the husband in the execution of the contract is a matter of no legal consequence whatsoever. In regard to the personal estate of the wife not held in trust for her separate use, the husband represents the wife, exercises all her authority; and indeed, in contemplation of law, the legal existence of the wife in that regard is merged in that of the husband. There is but one mode known to our law by which a married woman is authorized to join her husband in the execution of a contract, and that has reference to real estate, and is done under certain formalities, and guards against marital influence prescribed by statute, not attempted to be followed in this case. It was held in *Stamper v. Barker*, 5 Madd. 157, that the wife could neither be barred of

her right by survivorship to her reversionary interests, by her consent in court in favor of her husband, nor could she, upon separation from her husband, bind herself by deed stipulating that he should have a certain part of her contingent property when it should fall into possession.

The wife's consent, even in court, or her joining her husband in an assignment or deed for her reversionary interests, has been held ineffectual as to her right of survivorship in numerous cases: *Hornsby v. Lee*, 2 Madd. 16; *Woollands v. Croucher*, 12 Ves. 174; *Pickard v. Roberts*, 3 Madd. 384; *White v. St. Barbe*, 1 Ves. & B. 405. It is by force of the statute in this state that the wife's interest in property is affected, at law, by her joining in the execution of a conveyance.

The inquiry in this case, therefore, involves the question of the extent of the power of disposal by the husband of the wife's contingent interest or mere expectancy.

It appears to be well settled that the wife's contingent right by survivorship to her choses in action, immediately reducible into possession, may be barred by settlement before or after marriage, by actual reduction into possession, or certain acts held to be equivalent to actual reduction into possession; such as the recovery of a judgment or decree in the sole name of the husband; the taking of a note or obligation for the debt in the sole name of the husband; by an assignment by the husband for a valuable consideration; or by release. It appears to have been held in England, at one time, that an assignment for a valuable consideration of the wife's choses in action, presently reducible into possession, would not defeat the right of the wife by survivorship: *Burnett v. Kinaston*, Freem. Ch. 241. But for a series of years past it appears to have been settled in that country that an assignment or release for a valuable consideration, by the husband, of the wife's choses in action, immediately reducible into possession, would bar her title by survivorship: *Clancy's H. & W.* 150. But the more recent English equity cases are wholly irreconcilable with the former decisions on the subject of the power of the husband to defeat, by assignment, the contingent right of the wife by survivorship to her reversionary interests, or choses in action not immediately reducible into possession. In *Chandos v. Talbot*, 2 P. Wms. 601, *Bates v. Dandy*, 2 Atk. 206, and *Hawkins v. Obyn*, Id. 549, it was held that the wife's reversionary or contingent interest, or the possibility of a term, or the specific possibility of the wife, may be released or assigned by the husband for a valuable consideration so as to

defeat her title by survivorship. But a different doctrine was held to be law in *Hornsby v. Lee*, 2 Madd. 16, in *Purdew v. Jackson*, 1 Russ. 70, in *Honner v. Morton*, 3 Id. 65, and in *Milford v. Milford*, 9 Ves. 87. In the last-mentioned case, Sir William Grant disputed the soundness of the rule that the husband's assignment for a valuable consideration passed the wife's choses in action, freed from her contingent right of survivorship, upon the ground that in such case the purchaser would take a greater right than the husband had. In *Hornsby v. Lee*, *supra*, Sir Thomas Plummer held that the husband's right to the wife's choses in action was dependent on the contingency of his reducing them to possession during coverture; that a deed assigning a reversionary interest is not an actual reduction into possession, because it is impossible to reduce a reversionary interest into possession; and that it could not be a constructive reduction into possession, because its only effect is to place the assignee in the same situation as the assignor; that is, if the husband survive the wife, the assignee would retain the property; if, on the other hand, the wife survive, while the interest continues reversionary, she is entitled to the property.

It is proper to observe that our attention is directed to the question of the wife's right of survivorship, and the extent of the husband's power of disposal to affect it by assignment or release. We have nothing to do at present with the question, which is of frequent occurrence in chancery cases, touching the extent to which the husband, by assignment of the wife's property, may affect what is termed the wife's equity to a suitable provision out of the property for the support of herself and her children. That is a subject wholly disconnected with the question now before us, and presents very different rules for consideration.

In the case of *Purdew v. Jackson*, above cited, where the question directly arose as to the power of the husband to bar the wife's right by survivorship to such reversionary interest by an assignment for a valuable consideration, the authority of the decision in *Hornsby v. Lee*, *supra*, was strenuously denied; and the master of the rolls, in affirming his views expressed in the former case, after a patient hearing and searching investigation of the whole subject, said: "The law of marriage gives the wife's choses in action to the husband, on condition that he reduce them to possession during its continuance; if he die before his wife, without having done so, she takes them by survivorship. Now, then, his honor asks, can he bar her right of survivor-

ship by an act which is not a reduction into possession, and that too at a time when it is impossible, from the nature of the reversionary chose in action, that it should be reduced into possession? That if it be said that her right may be barred by something short of a reduction into possession, namely, an assignment for a valuable consideration, we must alter the doctrine laid down in our books. It will no longer be true that the husband shall not have the chattels personal of the wife lying in action unless he reduce them into possession during the marriage. That the effect of an assignment for a valuable consideration operates no otherwise than by putting the assignee in the place of the assignor; that the assignor cannot give to another a power which he himself does not possess; and that, therefore, where the wife has a chose in action, which the husband himself cannot recover, he cannot assign over to another the right to reduce it into possession. That the husband's right is merely a right to obtain possession of the subject when the period arrives at which the wife is entitled to the possession of it; and if he die in the mean time, leaving his wife surviving, his right is gone, and the right of the surviving wife takes effect. The assignee for valuable consideration must take the right as the husband himself had it; he buys the chance of the husband's outliving the wife, or of the reversionary chose in action falling into possession during coverture, and he must wait to see how the event turns out. That in this case the husband had died before the chose in action had been reduced into possession; the assignee had therefore lost all chance of recovering it, and the wife took it by her right of survivorship."

This doctrine was reaffirmed in *Morley v. Wright*, 11 Ves. 12, and also in *Ellison v. Elwin*, 13 Sim. 309. And again, in *Honner v. Morton*, 3 Russ. 65, Lord Chancellor Lyndhurst fully sustained this doctrine, which had been declared by the successive masters of the rolls, Lord Alvanley, Sir William Grant, and Sir Thomas Plummer, as to the reversionary interest of the wife; and in doing so, he took a distinction between a case where the husband had the power at the time of the assignment of reducing the chose in action, or interest, into immediate possession, and where he had not, holding that in the former case the assignment ought, in equity, to be regarded as a constructive reduction of the property into possession; for as he had the power of reduction into possession, and the assignment amounted to an agreement to do it, equity would regard that as being done which the party had agreed to do. This doctrine,

however, so well supported by authority and by reason, and apparently resting on ground incontestible, was strenuously, and with laborious research, controverted by Chief Justice Gibson in the case of *Siter and Another, Guardians of Jordan*, 4 Rawle, 468, wherein he contended that marriage worked not only a transfer to the husband of the wife's choses in action reduced to possession during coverture, but a transfer of the wife's dominion and power of disposal, so that whatever interest she might have assigned, if a *feme sole*, the husband could assign or release for a valuable consideration; and that the distinction between vested and contingent or reversionary interests of the wife, in respect to the marital dominion and power of transfer over it, made in the recent English cases, is without foundation. But the extensive and critical reviews of the English cases by Chief Justice Gibson was not necessary to the decision of his case, and could only have been designed to expose a supposed erroneous theory in the English decisions, inasmuch as the authority of the case of *Siter* is to the effect only, and can go no further than that the assignment of a wife's chose in action, by her first husband, to trustees, for the benefit of the wife and children, and to place it beyond the power of waste by a subsequent husband, was meritorious and valid in equity. The views of Chief Justice Gibson on this subject, however, have been adopted in subsequent decisions in Pennsylvania, in which they were applicable, and reluctantly followed in the recent case of *Webb's Appeal*, 21 Pa. St. 248, wherein the remark is made in the opinion of the court: "However averse to this conclusion some of us might be if the question were an open one, we remember that our office is *jus dicere*, and not *jus dare*; and we bow to authorities which we are bound to respect."

This doctrine, however, appears to be peculiar to Pennsylvania. I have not been able to learn that it has been recognized in any well-considered case in either of the other states in this country. The case of *Tuttle v. Fowler*, 22 Conn. 58, goes no further than to decide that the husband's assignment of the wife's chose in action capable of immediate reduction into possession was substantially such a reduction into possession by the husband as to defeat the wife's right by survivorship.

The doctrine of the decisions in England above mentioned was recognized as law by the court of errors and appeals in Mississippi, in the case of *Sale v. Saunders*, 24 Miss. 24 [57 Am. Dec. 157], and has been followed in numerous other cases in this country.

And the distinguished law-writer, Mr. Clancy, in his treatise on the rights, duties, and liabilities of husband and wife, sustains the doctrine of the English decisions in relation to the wife's right of survivorship in her contingent or reversionary estate, and denies that the power of disposal by the husband, so as to bar the rights of the wife, by an assignment for a valuable consideration, is absolute. The effect of the law upon this subject would seem to be that the wife's dominion, or power of disposal, which the husband, by virtue of the marital relation, assumes over the wife's choses in action, consists, not in his succession to the wife's right of property, but the power of control and management of her choses in action for the wife's benefit, together with the power of acquiring an absolute right of property in the same, so far as they are capable of reduction into possession.

There can be no ground for a distinction between the power of the husband to bar the wife's contingent right of survivorship by assignment and that of doing the same thing by release. If the husband could not by assignment transfer to the assignee any greater interest than that which belonged to him, he certainly could not by release to the releasee. The reason which controls in the one case must prevail as to the other. And where the husband has not the power of disposal to affect the wife's right by survivorship by assignment, he could not affect it by release.

This view of the law is decisive of this case. The interests in expectancy of the four daughters of Philemon Needles, whose husbands executed the instruments in the petition mentioned, were not, of course, capable of reduction into possession at the time of the execution of the instruments, and were not, by either of the husbands, reduced into possession afterwards. And in the proceeding now pending, the claim to the inheritance is set up in behalf of each of the wives, and not of that of either of the husbands.

It has been urged in this case, that where a *feme covert* has a right which, by possibility, may happen during coverture, the husband may release it, or covenant to release it for value, and *bona fide*, so as to bind the *feme* forever. And this raises the inquiry whether there was any right or interest which could have been the subject-matter of release at the time of the execution of the instruments in question. It has been said that "where the wife hath any right or duty which by possibility may happen during coverture, the husband may, by release, discharge

it:" Shep. Touch. 151. It is true, as a general thing, that all contingent and executory interests and contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, are assignable and releasable. But it is also a general rule that a naked or remote possibility cannot be released, for the reason that a release must be founded on a right in being, vested or contingent: 8 Bac. Abr. 280; *Pelletreau v. Jackson*, 11 Wend. 110. Where there is a present existing right, although to take effect in future, and even then only on a contingency, it may be released: *Woods v. Williams*, 9 Johns. 123. But in case of a mere possibility, or a remote possibility, which is termed in law a possibility on a possibility, 4 Kent's Com. 206, there is no right in being which can be the subject of release.

"The word 'possibility,'" says Smith on Real and Personal Property, "has a general sense, in which it includes even executory interests which are the objects of limitation. But in its more specific sense, it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost but recoverable seisin, like a right of entry. And what is termed a bare or mere possibility signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession, unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir, apparent or presumptive, has of succeeding to the ancestor's estate:" Smith on Real and Personal Property, 192. And it appears to be well settled that a contingent interest of a person unascertained, or a mere possibility as distinguished from a contingent interest in a person who is ascertained, or the mere hope or chance of succession of an heir apparent, cannot be released: Shep. Touch. 322, 328.

It is manifest, therefore, that at the time of the execution of the instruments in question there was no right or interest in being which could have been the subject-matter of release. But it is said that although such a release or assignment of the mere possibilities or expectancies of heirs apparent is wholly invalid at law, yet that a court of equity will regard it, and give effect to it, as a contract to release, when the interest becomes vested, and consequently that when the interest does so become vested, the claim of the releasee will be enforced, not indeed as a trust, but as a right under a contract. Or, in other words, that the hope or chance of succession would be barred by estoppel. It might be a sufficient answer to this to say that no claim is set

up in this proceeding in behalf of either of the husbands to any interest in his wife's inheritance from her father's estate; and that the instruments in question, if regarded in equity as contracts to be enforced, must be treated as the contract solely of each of the husbands, and as creating no estoppel against the wife. But for my own part, I feel no hesitation in questioning the validity of such a contract. What is the real character of the contract before us? Philemon Needles, in his life-time, made certain advancements to four of his daughters, and took from the husband of each a receipt for the amount advanced, in which the husband acknowledged the same "to be in full of all claims he could have against the estate of said Philemon Needles, after his death, as one of his heirs," and stipulating for himself and his heirs "not to set up any further claim." Where is the mutuality, either of consideration or of obligation, for this agreement? The advancement was a voluntary act; and whether Philemon Needles should thereafter give any more of his property to these children depended on his own pleasure. He could, by his will, so distribute his property as to wholly deprive them of any further share in his estate, or he could, as he actually did subsequently choose to do, in the distribution of his property by will, give them a further share in his estate. The stipulation only conceded to Philemon Needles that which was an inherent legal right of his own in the disposition of his own property. The real nature of the contract was such as to impose no binding legal obligation. If Philemon Needles chose afterwards to make further donations to these children, this contract could not prevent their accepting it; and if he was disposed to give all the residue of his property to others, he had the legal right and full power so to do without any such agreement.

But aside from these considerations, there is an insuperable obstacle in the way of giving effect to such a contract. The laws of the state have provided the mode for the distribution of a man's property after his decease. All dominion of the owner over it ceases with his life; and it must be distributed according to the bequests of his will, if he has chosen to make a testamentary disposition of it, and if not, then according to the law of descent and distribution. The owner is always allowed to provide by will for the division and distribution of his property after his decease. And the law has provided regulations, so far as the distribution of the estates of intestates can be affected by previous advancements to children. A man cannot provide for the division which shall be made of his property after his death, by

executory contracts with his children, instead of last will and testament. And to allow an intestate to control the course of descent and distribution by mere executory contracts with his children, during his life, would be to allow him to set aside the laws of the state. The property of a deceased person must pass by devise or descent. And the operation of the laws of the land in this respect cannot be defeated by any kind of executory contracts, made for the purpose of controlling or affecting the distribution of a man's property after his death. This opinion is in accordance with the views expressed by this court, in the case of *Crane v. Doty*, 1 Ohio St. 279.

We have been referred to the case of *Firestone v. Firestone*, 2 Ohio St. 415, as an authority to sustain the validity of such a contract. Although some of the reasoning of the opinion in that case would seem to favor such a contract, yet the effect of that case is certainly not in favor of the enforcement of such an executory contract, inasmuch as the decision is expressly placed upon the ground that the contract had been fully and specifically executed by an abandonment on the part of the son of all claim on the estate, after the death of the father.

The case of *Ives v. Metcalf*, 1 Atk. 63, is relied on as sustaining such a contract. That case is as follows: A and his wife covenanted in articles before marriage, in consideration of two thousand pounds, the wife's portion, to release all the right that might accrue to them out of her father's personal estate, by the custom of London. The lord chancellor, in sustaining this contract, says: "It is highly reasonable that such kind of articles should be carried into execution, and that when a father is bountiful to his children in his life-time, that he should have his affairs settled to his own satisfaction." This reason would be wholly futile under the laws of Ohio, for a man can have his affairs settled to his own satisfaction here by making his will, without relying upon any such executory contract. But the lord chancellor adds: "I found my opinion, too, on an old law well known in this city by the name of Jud's law, whereby a husband was authorized to agree with the father for the wife, though she was under age." There are numerous other cases bearing some analogy to this decided on the peculiar custom of London, and therefore entitled to no weight in the case before us.

In the case of *Morris v. Burroughs*, 1 Atk. 398, the lord chancellor refused to enforce a somewhat similar contract, saying that agreements of this kind ought not to receive encourage-

ment. Other decisions in England, however, have been referred to, which go far to sustain such agreements.

The case of *Quarles v. Quarles*, 4 Mass. 680, to which reference has been made, turned on the question of an advancement under the statute of Massachusetts, and is therefore not an authority against the conclusion expressed in this case.

Reference has been made to a class of cases where one of the heirs presumptive has purchased and paid a valuable consideration for the expectancy of another of the heirs in the ancestor's estate; and where two of the children have contracted with each other to divide equally whatever may come to them from an ancestor by devise or descent, in which such contracts have been sustained. Such is the effect of several of the cases, English and American, referred to by counsel in this case: *Trull v. Eastman*, 3 Met. 121 [37 Am. Dec. 126]; *Fitch v. Fitch*, 8 Pick. 480; *Beckley v. Newland*, 2 P. Wms. 182. These cases, however, turn upon a wholly different principle from that of the case before us, and bear no analogy whatever to it. Where two of the children contract with each other in regard to their expectancy from their ancestor, they stand upon equal footing, and although such contract cannot operate by way of assignment or release, yet where a valuable consideration has been paid, it may operate by way of estoppel, or be enforced in equity.

But in no view which I can take of such an executory contract between the ancestor and the heir expectant can it be sustained on any clear and satisfactory ground.

Ordered that an equal distribution be made among all the heirs at law of Philemon Needles, deceased, of the residuum of his estate undisposed of by will.

BRINKERHOFF, BOWEN, and SCOTT, JJ., concurred.

SWAN, J., having been counsel, did not sit.

RELEASE BY HEIR APPARENT OF HIS ESTATE IN EXPECTANCY, with a covenant of non-claim, made fairly and with consent of his ancestor, precludes the releasor from afterward setting up a claim to any part of his ancestor's estate, either as heir or devisee: *Curtis v. Curtis*, 63 Am. Dec. 651, and cases cited in note to same 654.

MERE POSSIBILITY IS NOT ASSIGNABLE, ACCORDING to *Mulhall v. Quinn*, 61 Am. Dec. 414; but the general rule seems to be that equity will uphold assignments, not only of choses in action, but of contingent interests and expectancies, and things having no present actual existence, but resting in possibility, if fairly made and not against public policy, and agreements for such interests will take effect as assignments, when the subjects assigned have ceased to rest in possibility and have ripened into reality: See *Field v. Mayor etc. of New York*, 57 Id. 435, and note 440.

ON AGREEMENTS TO MAKE PARTICULAR DISPOSITION OF PROPERTY BY WILL, see *Johnson v. Hubbell*, 66 Am. Dec. 773, and extended note to same 784-790, discussing the subject.

THE PRINCIPAL CASE WAS COMMENTED upon in *Murphy v. Murphy*, 12 Ohio St. 416. In the latter case it was held to be a settled rule that what is termed either a naked possibility, or a remote possibility, cannot be released, for the reason that a release must be founded on a right in being, either vested or contingent. And, said the court in the latter case, under this rule it has generally been held, while a present existing right may be released, although such right is not to take effect until in future, yet a mere possibility, or a remote possibility, which the law terms a possibility upon a possibility, cannot be released, it not being regarded a right in being which can be the subject of release; for it is only such a right as the hope which an heir apparent has of succeeding to the estate of his ancestor. And said the court in the latter case, under the application of this doctrine to the principal case, the court held a receipt in writing, and an agreement duly signed and sealed by the heir, executed and delivered to him in the life-time of the intestate, acknowledging the receipt of two thousand dollars in full of all claims against the estate of the person so paying the same, after his death, as one of the heirs, and thereby binding himself and his heirs to set up no further claim, did not preclude such heir from asserting his claim as such heir to his distributive share of such estate. The right so assumed to be released was held to be a mere possibility, and not the subject-matter of a release, at the time of executing said receipt. It was also suggested, in the opinion pronounced in the principal case, as an insuperable objection to the giving effect to such a contract, that the laws of the state had provided the mode for the distribution of a man's property after his decease. In the principal case the heir was entitled to a certain part of the estate by the statute law of the state. In *Murphy v. Murphy*, *supra*, the widow was held entitled to a certain part of the estate by the statute law of the state. In each case the contract was made with the intestate; and said the court in *Murphy v. Murphy*, *supra*, what is said of want of mutuality of contract in the principal case might, with equal propriety, be said in the other case. In *Bane v. Wick*, 14 Id. 508, the principal case was cited to the following propositions: The intention of the testator has no efficacy, and can be regarded only so far as it is apparent in the dispositions made by his will. If he has left property undisposed of, its disposition is not governed by his will, but by another rule, having its origin in another source, in the application of which the intent of the testator can have no influence. This rule operates in the same manner as if the deceased had left no other property, and made no will. As to the devised property, he is a testator; as to that not disposed of, an intestate. In *Dittor's Adm'r v. Clancy's Ex'rs*, 22 Id. 441, it was held that the partial disposition of an estate by will does not exclude the operation of the statute regulating advancements, in the distribution of the intestate residuum; and that a gift to a son-in-law, intended by the ancestor to be charged as an advancement against his daughter, and not subsequently converted by him into a gift absolute, will be so charged against her in the distribution of his intestate property, if she, knowing the fact and intention of the gift shall have acquiesced therein; but the principal case was therein cited to show that gifts to sons-in-law, supposed to have been originally intended by the ancestor as advancements to his daughters, were held otherwise, on its plainly appearing that in making a subsequent partial disposition of his estate by will he had treated them as, and therefore converted them into, unqualified gifts. At the date of the deed men-

tioned in *Hart v. Gregg*, 32 Id. 511, the grantor had no interest in the land that could be assigned or released; and the court in that case said: "No one is an heir to the living. During the father's life, all that the son had was a mere naked possibility, not coupled with an interest, which could not be released, assigned, or devised. Neither would it descend to his heirs. It could only be extinguished by estoppel." To this the principal case was cited. In *Rosenthal v. Mayhugh*, 33 Id. 168, it was held that a *feme sole*, having capacity to contract, could bind herself by her representations and covenants so far as to estop her in equity from repudiating a contract fully executed in good faith by her grantee, and as she supposed and intended at the time, fully executed on her part. The principal case was relied on to support an opposite conclusion; but the court said: "That case, so far as it bears on this, merely holds that, at common law, the mere expectancy or chance of succeeding to an estate is not the subject of release or assignment, but, as the opinion shows, may be upheld in equity; and that a married woman must join her husband, as provided by the statute, to bind her real estate, but it is also expressly held that in equity it is a different question."

EVANS v. STATE.

[8 OHIO STATE, 196.]

STYLE OF INSTRUMENT ALONE DOES NOT DETERMINE ITS LEGAL CHARACTER.

A forged instrument in the following form, save the mere spelling, will be regarded as a statutory "order" for the payment of money, and not as a mere request: "Wen 19th. Mr. Davis pleas let the boy have \$6,00 dolers for me. B. W. Earl."

INDICTMENT for forgery. The first count of the indictment charged plaintiff with forging "a certain order for the payment of money." It then set out a copy of the order in the form given in the syllabus *supra*. A conviction was had under this count. It appeared from the bill of exceptions that the state, after having laid the proper foundation, offered in evidence the instrument alleged to be forged, and which in all respects, save the mere spelling, corresponded with that set out in the first count. Defendant objected, on the ground of variance between it and the paper described in the indictment. The objection was overruled, and the paper allowed to go to the jury. The plaintiff, however, in the appellate court, abandoned the question of variance, and urged the single point that the instrument in question was not an "order" for the payment of money, as named in the first count, but only a "request."

R. S. Moodey, for the plaintiff in error.

C. P. Wolcott, attorney-general, for the state.

By Court, SCOTT, J. If we look simply to the terms of the false instrument set out in the indictment in this case, a decision either way of the question presented might be sustained by a copious reference to authorities.

The leading English cases would decide the question in favor of the plaintiff in error. Perhaps the instincts of humanity had their influence in those decisions; for under their statute, then in force, the question became one of life or death to the prisoner. Under the more humane criminal codes of an advancing civilization, the courts of this country have generally held a different doctrine.

It is by no means surprising that this conflict of authorities should be found in relation to instruments similar in their terms. The language employed may be such that the legal character of the instrument would depend upon the relations subsisting between the parties, and the circumstances of the case. These circumstances may have been such in the present case as, had the paper been genuine, would have given Earl, the drawer, a right to expect and require the compliance of Davis with its terms. He may, for instance, have had funds in the hands of Davis, subject to his own order; and in such case, the instrument in question would naturally be regarded and treated by the parties as an "order," and would both in fact and in law be such, notwithstanding the civility and courtesy of the terms in which it is couched. The style alone cannot determine the legal character of the instrument, for a rude request may be more mandatory in its form than a courteous order.

In this case there was no special finding of the facts by the jury, and the bill of exceptions does not purport to contain a statement of all the evidence, but seems to proceed on the idea that this instrument, from its very terms, could not under any circumstances be regarded as a statutory "order" for the payment of money. We think otherwise.

Judgment affirmed.

BARTLEY, C. J., and SWAN, BRINKERHOFF, and BOWEN, JJ., concurred.

HOLLISTER AND SMITH v. JUDGES OF DISTRICT COURT OF LUCAS COUNTY.

[8 OHIO STATE, 201.]

EVERY COURT OF RECORD HAS SUPERVISORY AND PROTECTING CHARGE OVER ITS RECORDS and the papers belonging to its files.

EVERY COURT HAS POWER TO DIRECT CLERK, NOT ONLY TO CORRECT CLERICAL ERRORS, but to order its records and files to be restored to their original condition, where they have been fraudulently or otherwise improperly altered or defaced.

EVERY COURT HAS POWER TO ORDER SUBSTITUTION OF PAPERS in case the originals are purloined or lost. In making corrections, etc., the clerk is under the control and authority of the court.

PERSONAL KNOWLEDGE OF JUDGE IS NOT ESSENTIAL TO CORRECTION OF CLERICAL ERROR. The court may hear evidence and act on the proof.

JUDGES OF COURT OF COMMON PLEAS IN OHIO ARE JUDGES OF DISTRICT COURT, under the constitution and laws of that state, and as such are empowered to exercise its authority.

OBJECTION THAT WRIT OF MANDAMUS IS DIRECTED TO PERSONS AS JUDGES of the district court, instead of to the district court, is untenable.

WRIT OF MANDAMUS DIRECTED TO SUBORDINATE JUDICIAL TRIBUNAL IS PROPERLY DIRECTED to the judge or judges of such court, especially where there may be other judges authorized to hold or participate in holding the court, as authority is exercised over the judges personally in case of disobedience.

MANDAMUS. Motion for a peremptory writ. An alternative writ of *mandamus* had been issued out of the supreme court at the instance of Hollister and Smith. It was directed to the judges of the district court of Lucas county, and commanded them to cause an order to be made, or show cause why they should refuse so to do, directing the clerk of said district court to correct the record in a certain action which had been tried at the April term, 1855, of said court. In said action, Hollister and Smith were defendants, and John P. Reznor was plaintiff. The correction prayed for was that there should be restored to the bill of exceptions, signed, sealed, and filed in said case as a part of the record thereof, certain material words which, as was alleged, the judge of the court of common pleas, who presided at said term of the district court, had improperly stricken out of the bill of exceptions, outside of the court-room, after the final adjournment of the court, without personal consultation with either of the judges of said court, and without the knowledge or consent of Hollister or Smith, or their attorneys. And this alteration, it was alleged, was not the act of the district court. One of the judges of the court of common pleas, and who was one of the judges composing the district court at the

time the said bill of exceptions was signed, made a return to the alternative writ, and the objections made to the correction of the alteration in the bill of exceptions appear in the opinion.

Waite and Murray, for the relators.

By Court, **BARTLEY**, C. J. The objections made to the correction of the alteration in the bill of exceptions, on behalf of the defendants, appear to be the following: 1. That two of the judges know nothing about the facts; 2. That they have no authority over the clerk in the premises, and can make no order that he is bound to obey; 3. That they are judges of the court of common pleas, and only as such authorized to hold a district court; 4. That the alternative writ was directed to them as judges of the district court, and not to the district court.

Every court of record has a supervisory and protecting charge over its records and the papers belonging to its files, and may at any time direct the correction of clerical errors, or the substitution of papers in case the originals are purloined or lost; and in the exercise of the same authority in case the records or files should be fraudulently or otherwise improperly altered or defaced, may direct their correction and restoration to their original condition. And in making such corrections, the clerk is under the control and authority of the court.

Two of the judges, it is said, have no knowledge of the facts touching the alleged alteration of the bill of exceptions. This is no legal excuse for not doing the act directed, when they have the unquestionable authority to direct the relators and other parties interested to produce their proofs in relation to the matter. The personal knowledge of the judge is not essential to the correction of a clerical error. He may inquire into the matter, and inform himself by competent evidence, and act upon that, as he acts upon proof given in court in the performance of other judicial acts.

It is objected that the defendants are judges of the court of common pleas, and only as such authorized to hold a district court. It matters not in what form of expression the judicial power is conferred. The defendants are, by the constitution and laws of the state, constituted judges of the district court, and as such clothed with full authority to hold the district court, and exercise its jurisdiction and authority. And their authority to exercise chamber powers in vacation, touching causes pending in the district court, by allowing and dissolving injunctions, and performing other acts as judges of the district court, cannot be

controverted. And the fact that they are judges of the common pleas does not, under the constitution and laws of this state, render them incompetent to act as judges of the district court.

There is nothing in the objection that the writ is directed to them as the judges of the district court instead of the district court. The writ was properly directed. They are the judges of that court, and as such clothed by the constitution and laws of the state with power to hold that court and exercise its authority.

A writ of *mandamus* to a subordinate judicial tribunal is properly directed to the judge or judges of the court, and especially where there may be other judges authorized to hold, or participate in holding, the court. In case of disobedience to the mandate of the supervisory court, the authority to compel obedience is exercised over the judges personally, having the power to exercise the functions of the court.

~~Peremptory mandamus awarded.~~

BRINKERHOFF and SCOTT, JJ., concurred.

SWAN, J., dissented.

POWER OF COURTS TO ORDER CORRECTION AND AMENDMENT OF THEIR RECORDS: See *Sweeny v. Delany*, 44 Am. Dec. 136, and note; notes to *Jones v. Lewis*, 47 Id. 340; *Lewis v. Ross*, 59 Id. 49; *Whitwell v. Emory*, Id. 220.

PAROL EVIDENCE OF LOST JUDICIAL RECORD: *Lyon v. Bolling*, 48 Am. Dec. 122, and note 129; *Eakin v. Vance*, Id. 770, and note 771.

THE PRINCIPAL CASE WAS CITED in *Van Buskirk v. City of Newark*, 28 Ohio St. 39, to the point that under the judicial system of Ohio the judges of the court of common pleas are judges of the district court.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

COMMONWEALTH EX REL. ATTORNEY-GENERAL v.
GARRIGUES.

[28 PENNSYLVANIA STATE, 9.]

MODE PRESCRIBED BY STATUTE FOR INQUIRING INTO AND DETERMINING REGULARITY AND LEGALITY of municipal election and of the returns made thereof must be followed as provided, to the exclusion of the common-law mode of redress.

JUDGMENT OF PARTICULAR COURT ON MERITS, WHERE MADE FINAL BY STATUTE, cannot be drawn in question in another court in a proceeding different from the statutory mode.

STATE IS BOUND BY STATUTES MADE TO PREVENT TORTIOUS USURPATION, and to regulate and preserve the right of all elections.

WRIT of *quo warranto* issued out of the supreme court on the suggestion of the attorney-general against William Garrigues, to show by what claim and authority he exercises the office of alderman. The basis of the relator's claim is that one Wynkoop, who, however, was not joined as a party, at the said election for alderman, received eight votes more than did Garrigues, and was therefore legally elected and entitled to the office. The remaining facts appear in the opinion.

***R. N. Waite*, for the commonwealth.**

***J. B. Townsend*, for the defendant.**

By Court, Lewis, C. J. The act of the second of February, 1854, provides that the returns of all municipal elections (with exceptions not material to the present case) "shall be subject to the inquiry and determination of the court of common pleas of the county of Philadelphia, upon the complaint of fifteen

or more of the qualified voters of the proper ward or division, which complaint shall be filed in the said court within twenty days after such election," etc., and "the said court in judging of such elections shall proceed upon the merits thereof, and determine finally concerning the same, according to the laws of the commonwealth." If the election of William Garrigues had been contested in the manner thus prescribed, the judgment of the court of common pleas would have been final. It would not have been reversed by *quo warranto*, or by any other collateral proceeding. Even a *certiorari* would only draw into review in this court the regularity of the proceedings, without reaching the merits of the case as disclosed in the evidence. On the merits, the judgment of the common pleas, by the terms of the act of 1854, is final and irreversible. In addition to the provisions of the statute to this effect, the principle of the common law produces the same result. It is the interest of the public that there should be an end to contention. Justice to the parties requires that no one should be twice vexed for the same cause. For these reasons, the general rule of the common law has been established, that no judgment of a court of competent jurisdiction can be re-examined in a collateral proceeding. If the election had been contested in the manner prescribed by the statute, the decree of the common pleas could not have been re-examined in this form of action. Can the commonwealth gain any advantage by disregarding the requirements of the statute? The act of 1806 furnishes an answer to this question. The remedy prescribed by the statute must be pursued.

But it is argued that the commonwealth is not bound by the statute. It is true that the general rule in England is that the king is not bound by a statute if he be not named in it. But this rule has many exceptions. All statutes made to suppress wrong, to take away fraud, to prevent the decay of religion, to prevent tortious usurpations, or to secure to electors the right to make free election, are excepted out of this rule in England, and bind the king although he be not named: 5 Co. 14 b; Dwarries on Stats. 27, 28. The act of 1854 comes within the spirit of several of these exceptions. In addition to this, the subject-matter, being one in which the commonwealth is the chief party in interest, plainly indicates an intention to bind the state. If this were not the construction, the statute would be almost inoperative. It is therefore our opinion that the remedy prescribed by the act of 1854 excludes all other remedies for matters which might have been investigated in the form prescribed

by that act. It is not necessary to determine how far this statute binds Henry Wynkoop. He is not a party to this suit. He has carefully avoided becoming the relator, or in any way making himself liable for costs.

The thirteenth section of the act of the thirteenth of April, 1840, applies to writs of *quo warranto* brought by individuals, in which the controversy is "between persons claiming to be duly elected." It does not therefore apply to this case. If it did, it is repealed by the act of 1854, so far as the former is repugnant to the provisions of the act last mentioned.

It follows that the defendant is entitled to judgment on the demurrer.

Judgment for the defendant; and it is ordered that the county of Philadelphia pay the costs.

REMEDIES OUT OF COURSE OF COMMON LAW WHICH ARE GIVEN BY STATUTE must be pursued to the letter: *Election Cases*, 65 Pa. St. 41, citing the principal case.

PRICE v. TAYLOR.

[28 PENNSYLVANIA STATE, 95.]

LAW OF ESTATES-TAIL DISCUSSED.

ESTATES-TAIL ARE INCLUDED IN PENNSYLVANIA INTERSTATE ACT of April 8, 1833, regulating the descents of real estate, and descend to the heirs generally, and not to the eldest son.

UNDER RULE OF INTERPRETATION THAT FAVORS HEIR IN DOUBTFUL CASES, Pennsylvania courts incline in favor of estate-tail where it descends to all the children equally, as such course would be in exact accordance with the Pennsylvania laws of lineal descent.

PURPOSE OF PENNSYLVANIA ACT OF APRIL 27, 1855, is to convert words of entailment in estates thereafter created into words of general inheritance in fee, and thereby repeals the statute *de donis conditionalibus*.

WILL DOES NOT TAKE EFFECT UNTIL TESTATOR'S DEATH, and therefore, if a will is written and executed before the passage of a law, but the testator does not die till after the enactment of the law, the will is created after the passage of the law, and must be governed by it.

ESTATE-TAIL GENERAL IS CREATED IN A. B. T., DEVISEE, under the following provision in will, if considered independently of the Pennsylvania act of 1855, viz.: "I give and bequeath all my certain land to my granddaughter, A. B. T., for and during her life, provided she shall not leave issue at her death; but if she shall leave lawful issue at her decease, then it is my will that my plantation shall go in fee-simple to her heirs forever. In case she shall not leave issue at her death, I give and devise my said plantation to the children of my sister, R. B.; it to be sold and the proceeds divided between them, share and share alike; and

if any of my said nieces or nephews, the children of my said sister R., should be deceased, leaving children, their shares respectively to go to said children." The fact that the devise over is on an indefinite failure of issue will not prevent the devise from creating an estate-tail; and the limitation to the issue in fee-simple goes for nothing, as being inconsistent with the lineal descent with which the estate starts.

ESTATE-TAIL HAS BUT ONE LIFE'S DURATION if the donee dies without leaving issue at his death, but it is not shortened by the fact of there being a limitation over on that condition.

FEE IS CONVERTED BY IMPLICATION INTO ENTAIL by limitation over on indefinite failure of issue; but if, instead, the limitation over be on default of issue at death of the first taker, no such implication arises, and the limitation over merely reduces the fee to a conditional one.

DEBT. The plaintiffs, Richard B. Taylor and his wife, Ann B. Taylor, had agreed to convey to defendant the certain property mentioned in the devise following, and in pursuance of the agreement tendered a deed in due form, demanding the purchase price. This amicable action was then brought for the purchase price, so as to determine the title to the property and what estate had passed to the plaintiffs under the devise, which was in the following words: "I give and bequeath all my messuage, plantation, or tract of land, situate in the township of Pennsbury, to my granddaughter, Ann B. Taylor, for and during her life, provided she shall not leave issue at her death; but if she shall leave lawful issue at her decease, then it is my will that my plantation shall go in fee-simple to her heirs forever. In case my said granddaughter, Ann B. Taylor, should not leave issue at her death, I give and devise my said plantation to the children of my sister, Rebecca Baker; it is to be sold, and the proceeds divided between them, share and share alike; and if any of my said nieces or nephews, the children of my said sister Rebecca, should be deceased, leaving children, their shares respectively to go to said children." The said Richard B. Taylor and wife have one child living. The remaining facts are stated in the opinion.

Fulhey, for the plaintiff in error.

Darlington, for the defendant in error.

By Court, **LOWRIE, J.** All social progress implies some changes in customs and institutions, and these always involve some degree of confusion.

Social development is a continual changing of the spirit of the social system, and if it is not closely observed, and intelligently followed by corresponding and harmonious forms and

institutions, society finds itself embarrassed by the conflicting elements of an inconsistent system. Very commonly, forms and institutions remain unchanged, at least nominally, until long after the principles which they were intended to express and enforce have been essentially altered. And very commonly the old system is altered and amended, either by custom or by legislation, in its most prominent parts, without any adequate attempt being made to adapt the alterations to the minor portions of the system which are properly related to them; and in this way the system becomes seriously complicated in some of its parts. In no parts of our legal system do we meet with greater confusion of ideas, manifested in practice, than that which exists in relation to future and contingent estates and to estates-tail; and it is noticed by every writer who treats of these estates.

It is natural to expect greater confusion of thought on this subject here than in England, because of the old and complicated principles being applied here to widely different systems of real estates. In no work has it been so well presented as in Mr. Smith's treatise on executory interests, which contains a very thorough, systematic, and accurate view of the whole subject, in its English aspect, and ought to be referred to in the study of all its different questions.

Very naturally, the rule in *Shelley's Case* has shared in these embarrassments. Its application becomes quite complicated with us, because of its having been at first accepted in its English form, and not in its principle; and thus it became an incongruous element in our differing system of descents. It was a logical consequence under the English law of inheritances that an estate-tail general should descend to the eldest son. But with us it would, in logical consequence from our law of descents, have passed to all lineal descendants, according to our law of equality among children. Not being thus treated, it necessarily becomes an element of disorder and confusion. Along with devises and conveyances to a person and his heirs generally, or his lineal heirs in the male or female line, this special kind of estates and assurances was fully confirmed by the statute *de donis conditionalibus*.

If the grant was to a man and his heirs generally, it descended to his lineal and collateral heirs according to the laws of inheritance generally. If to a man and his lineal heirs, general or special, it descended in the general or special line indicated; those who were to take under it being ascertained by the rules

of lineal descents. It was to these institutions that the rule in *Shelley's Case* was applied; and it is very simple and very just in its principle, however difficult it may sometimes be in its application.

In its principle, it is very like to the rule of the statute of uses and of our equity, that disregards the mere form of a title to land, and even some of its minor incidents, and treats it as being really his to whom it substantially belongs, though the form and intention be otherwise. That we may discuss the rule in *Shelley's Case* with sufficient clearness for the present case, and for general purposes, and obtain a perfectly distinct comprehension of the idea which it expresses, we may present it in its simplest form; and as it most frequently refers to devises, we shall speak only of this kind of conveyance. And as the rule has a double aspect, we may divide it into two. Then the first one may be thus expressed: a devise to one for life, with remainder to his heirs, creates a fee-simple. The law so treats it, because it is substantially so, and sets aside the apparent intention to make two estates out of it. And the second one may be thus expressed: a devise to one for life, with remainder to the heirs general or special of his body, creates a fee-tail, general or special. It is substantially a fee-tail, and so the law treats it, notwithstanding the form in which the devise is expressed: Smith on Executory Interests, secs. 423, 453, 479; Williams on Real Prop. 192-195.

The words "heirs" and "heirs of the body," most frequently express the relation in which the second takers must stand to the first, in order to come within the rule. But the presence or absence of these words is not conclusive either way, for any other words, such as "next of kin," "sons," "daughters," "issue," "children," "descendants," will answer quite as well, if they appear to be equivalent; and the most appropriate words will not answer, if used in a special and inappropriate sense.

Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will be sufficient, unless it be perfectly clear that such heirs are selected on their own account, and not simply as heirs of the first taker: 1 Bro. C. C. 219.

These propositions combined express the one principle of law, that a devise to one for life, with remainder to his heirs, general or lineal (in substance, even though not in form), such heirs shall be ascertained by the laws of inheritance, general or lineal, and shall be treated as taking by descent from the devisee.

and not by purchase from the devisor. This being the general law of such cases, it becomes entitled to the presumption that it is right, and therefore to the aid of the presumption, that cases falling apparently within the reason of the rule are intended to be governed by it. And surely, the law may very well allow a devisee to reject all limitations upon the relation of ancestor and heir, except such as the law itself declares.

If, therefore, the remainder is to persons standing in the relation of general or special heirs of the tenant for life, the law presumes that they are to take as heirs, unless it unequivocally appears that individuals other than persons who are to take simply as heirs are intended: *Smith on Executory Interests*, sec. 479; *Fearne*, 188; *Burrin v. Charlton*, 1 Man. & Gr. 429; *Jones v. Morgan*, 1 Bro. C. C. 219; *Lessees of Findlay v. Riddle*, 3 Binn. 163, 164 [5 Am. Dec. 355]. We need not refer to the mere feudal reasons that were involved in the origin of the rule, for they have passed away.

The rule regards such devises, not according to their accidental, but according to their substantial, character, and thus erects a general principle of interpretation for all such grants, and saves them from the mere arbitrariness that would necessarily result from supposing that every such grant has a purpose peculiar to itself. There is another reason, somewhat more specific, and which appears especially in cases where the subsequent takers are described as lineal descendants of the prior one. In almost all such cases the sons, daughters, children, or issue that are to take are to be ascertained at the death of the first taker. If, therefore, the devise be to A for life, with remainder to his eldest son and his heirs general or special, or to his children and their heirs, etc., then it must be treated in one of these two modes. The eldest son or the children must take either as purchaser from the devisor, or as heirs of their ancestor. But generally they are not living at the time of the devise, and are left to be ascertained at the death of the ancestor, and not until then can the grant take effect in their favor. If, therefore, the eldest son or the children are to take as purchasers, and should die before their parent, they would take nothing, and of consequence no children or grandchildren of theirs could take under such a devise, for no one can take as heir that which his ancestor never owned.

Going on this hypothesis, a devise over may take effect even while many of the descendants of him who was intended to be the first taker are still living; yet it is very certain that, as a

general rule, it is intended in such devises that they shall be for the benefit of all the issue of the first taker indefinitely, and shall not go to others so long as any of them survive. If we treat the descendants of the first taker as deriving title by descent from him, and not by gift from the devisor, then this purpose is effected, and without it, it could not be: *Smith on Executory Interests*, secs. 434, 435; *Doe ex dem. Candler v. Smith*, 7 T. R. 531; *Bennett v. Earl of Tankerville*, 19 Ves. 178; *Baggett v. Fries*, 11 East, 674.

The law first ascertains, as matter of mere interpretation, that persons in a certain line or lines of descent from one person are to be preferred to all persons that are collateral to those lines, and then, in order to effectuate this intent, it starts the title with and the descent from him, if he had such connection with the estate as to enable this to be done.

This may very often defeat the specific form in which a devise is worded, but it meets and answers its paramount intent in its definition of the objects of the testator's bounty, though it at the same time allows those to whom the title passes to defeat his ulterior purposes by selling the property. In some instances the subsequent takers are described as issue, and then the literal interpretation would be that all descendants, children, grandchildren, etc., living at the death of their ancestor, should take together and equally; which, as an interpretation of intention, would be much less probable than that to which the laws of lineal descent direct us. And in many cases the word "issue" is unaccompanied by superadded words of inheritance, and if regarded as a word of purchase, the result (until lately) would have been a mere life estate; but that word may be used as one of inheritance; and when it is so used, the children inherit fees, either general or special.

Again: an estate-tail—that is, an estate that is to pass by lineal descent, according to the laws and customs of the country—is the very form of transmission of property to which persons are naturally most favorable; and therefore we naturally incline to expect this law of descent to be provided for when the devisor thinks of anything beyond the laws of descent of a fee-simple. Now, plain as is the principle intended to be expressed by the rule, it has not been found simple in its application, even in England, where it was better adapted in its form to their rules of real property than it is here. And it can hardly be expected to be of easier application here, where, as at first admitted, it was really a heterogeneous element of our law.

Receiving it in the English sense of it, in its application to estates-tail, and considering the eldest son as the heir to an estate-tail general, we in fact reversed the order of our law. According to it an estate-tail general would have descended to all the children, just as in England it would pass to the youngest son if it was borough English land, or to all the sons equally in tail if it was gavelkind land: *Doe ex dem. Bosnall v. Harvey*, 4 Barn. & Cress. 610; *May v. Milton*, Dyer, 133, pl. 5; and *Anon-ymous*, Id. 179, pl. 45; *Roe v. Aistrana*, 2 W. Black. 1228; or to all the daughters equally if it was a devise in tail female.

It could only be a special tail male that could in strict systematic propriety descend with us to the eldest son. On the branch of the rule making a devise to one for life, and remainder to his heirs generally a fee-simple, we never thought of looking away from our law of descents in order to find the heir.

If it was an error to admit the eldest son as the heir to an estate-tail general, under our law, it was perhaps an inevitable one, for, inheriting all our forms of wills and conveyances, and of legal practice, from England, we could not, if we would, at once build up a perfectly consistent system of legal principles, founded on our new circumstances.

Besides this, our early practice was very probably a proper expression of the intention of such devises, for the law of equality among children could not very soon change the long-established custom of giving a substantial preference to the eldest son. It continued to exist even in our statutes for a hundred years so far as to give the eldest son a double share, and many of our early decisions are upon wills made before the rule of entire equality was instituted. In former times it was not generally regarded as wrong for the eldest son to inherit the whole real estate of his parent, subject to such charges as the parent thought proper to impose upon it. But now it is entirely different, since law and custom have introduced entirely different expectations.

Now, therefore, we never suppose that a devise in form to create an estate-tail was really intended to pass the land to the eldest son, and such an interpretation could not possibly be endured, were it not for the facility with which such estates may be changed into fees-simple; and I have known several instances in which eldest sons were too honorable to claim an estate thus descending to them.

The feeling of the hardship of such an interpretation has undoubtedly been the cause of some of the confusion to be found

in the application of the rule to cases where the ancestor had died without barring the entail. Now, without deciding, we venture the suggestion that since the laws of intestates and of wills, of 1833, an estate-tail must descend according to our law of lineal descents, and not according to the old English common law; and the following reasons present themselves in support of the suggestion:

1. The reason why estates-tail descended to the eldest son, under our old law of descent, was because the descent of such estates was not provided for under our old statutes, and therefore the old common law alone furnished the rule for them: *Saunder v. Morning-Star*, 1 Yeates, 315.

Our old statutes of descent provided only for the descent of land which the decedent could dispose of by deed or will, and estates-tail did not then fall within that category. But the act of 1799 changed this, and allowed estates-tail to be sold and conveyed by deed in a very simple form. Therefore the new law of intestates, of 1833, expressly includes such estates, because it declares the line of descent of all land which the decedent might have sold in his life-time or disposed of by will.

2. Our statute of wills, passed on the same day with the intestate law, and one of its supplements (sixth of May, 1844), provides for a lineal descent, in order to prevent a devise to a child, or to a brother or sister, if there is no child, from lapsing by the death of the devisee in the life-time of the testator; and in such case the descent goes according to our law of lineal descents, on the supposition that such is the testator's intention, that is, on the principle of entailment until it vests.

It may also be worthy of notice that the decisions in relation to contingent remainders tend in the same direction, in order to keep them from falling by the particular estate enduring beyond the life of the remainderman.

3. The judicial adoption of the English law of primogeniture in estates-tail has entirely ceased to have any support in our laws and customs, and is now plainly incompatible with them all. Therefore we can no longer presume, from general words of entailment, that a lineal descent according to the English law is intended.

4. This principle would make our law on this subject perfectly simple and homogeneous, and we might hope to have wills of this character easily interpreted by the parties or their counsel, without the necessity that now exists of always resorting to the courts for an authoritative interpretation of them before

making or accepting a title under them. It may be thought that since the act of 1855, converting entails thereafter created into fees-simple, this principle can be of very little use. But this estimate of it may change when it is considered that for a very long time to come the old forms of wills and conveyances will continue to be used, and will require interpretation, and that most of the wills involving these questions, written since 1833, yet remain to be interpreted.

And under this principle the rule of interpretation that favors the heir in doubtful cases would be differently applied, even to the same language, depending upon the question of the form of the lineal descent. We incline in favor of an estate-tail, if it is to descend to all the children equally, because that is in exact accordance with our laws of lineal descent, and with our customary modes of thinking.

We may now resume the consideration of the special case before us, and ascertain the influence which the act of 1855 has upon it. The purpose of that act is to convert words of entailment in estates thereafter created into words of general inheritance in fee. It repeals the statute *de donis conditionalibus*.

Though this will was written before the act was passed, yet it did not take effect by the testator's death until some months afterwards. It was therefore created after the law, and must be governed by it.

A will, so far as its form is concerned, would hardly be condemned if it conformed to the law under which it was written. And interpretation must, of course, read it as of the time when it was written; but a law would and does apply to the will, irrespective of intention, and takes hold of it only when it goes into effect. Then the question arises, Would this will create an estate-tail independently of the act of 1855?

We may translate the clause in question into some approximation to the usual language of such devises, thus: I give my plantation to Ann for life, with remainder to the heirs of her body in fee-simple forever (or, and their heirs and assigns forever), but if she die without leaving issue living at her death, then I give the same to my sister's children. We have used the term "heirs of the body" where the testatrix used only the word "heirs," because her use of the word "issue," as a synonym, shows this to be her meaning. She means that it shall go to Ann's lineal heirs, if she has any, and if not, then over. It is very evident that they are to take the remainder, not as persons selected out of the number of her lineal descendants, but

as the lineal descendants of every degree from the first taker, and according to our law of descents, and therefore, under the rule in *Shelley's Case*, they take an estate-tail: Fearn, 188.

It is for Ann "and her children after her:" *Lessee of Haines v. Witmer*, 2 Yeates, 405; *Parson v. Lefferts*, 3 Rawle, 73. It is supposed that it is not an estate-tail, because the devise over is on a definite failure of issue; that is, in default of issue living at the death of the first taker. But the contingency on which a remainder depends does not properly enter into the definition of the precedent estate, though it often happens that their definitions run into each other.

The element of issue living at the death was in the cases of *Carter v. McMichael*, 10 Serg. & R. 429, and *Maurer v. Marshall*, 16 Pa. St. 377; and yet the devises were entailments. It is also to be found in many other cases of entailment: *Broadhurst v. Morris*, 2 Barn. & Adol. 1; *Ireson v. Pearman*, 3 Barn. & Cress. 799; *Doe v. Goldsmith*, 7 Taunt. 209; *Wright v. Pearson*, 1 Eden, 119; *University v. Clifton*, Id. 473; *Birmingham v. Cannon*, 12 C. B. 18; *Doe dem. Cannon v. Rucastle*, 8 Id. 876; *George v. Morgan*, 16 Pa. St. 95.

The limitation to the issue in fee-simple forever goes for nothing, as being inconsistent with the lineal descent with which the estate starts. Words of that kind are very often rejected as incompatible with the character of the descent, just as in England words indicating that the property was to be divided among the heirs are rejected as contrary to the usual character of the descents with them: *Doe v. Goldsmith*, 7 Taunt. 209; *Doe dem. Cannon v. Rucastle*, 8 C. B. 876; *Doe v. Cooper*, 1 East, 229; *Doe ex dem. Foquett v. Worsley*, Id. 424; *Pierson v. Vickers*, 5 Id. 548; *Doe ex dem. Candler v. Smith*, 7 T. R. 531; *Bennett v. Earl of Tankerville*, 19 Ves. 170; *Jesson v. Wright*, 2 Bligh, 1.

Such words are not inconsistent with our law of lineal descents, and they are found in the case of *Maurer v. Marshall*, *supra*, an estate-tail under a will since the act of 1833. An estate-tail has but one life's duration, if the donee dies without leaving issue at his death; but it is not shortened by the fact of there being a limitation over on that condition. A fee is converted by implication into an entail by a subsequent limitation over on an indefinite failure of issue. But if the limitation over be on default of issue at death, no such implication can arise, and the limitation over merely reduces the fee to a conditional one: Smith on Executory Interests, secs. 128, 584, 649; *Doe ex dem. Barnfield v. Wetton*, 2 Bos. & Pul. 324; *Lessee of Willis v. Bucher*, 2 Binn. 455;

Hoge v. Hoge, 1 Serg. & R. 144; *Sheets's Will*, 3 Id. 487, note; *Eichelberger v. Barnitz*, 9 Watts, 450; *Stewart v. Kenower*, 7 Watts & S. 288. The actual form of this devise is for life, if Ann shall not have issue. It is not without example: *Shaw v. Weigh*, 2 Stra. 798; *Parson v. Lefferts*, 3 Rawle, 59; but it is a mere reversal of the mode in which the thought is usually expressed; and the substantial thought remaining the same, it does not affect the question. There is a limitation to the issue in fee; but this does not affect the question. So there was in *Hileman v. Bouslaugh*, 13 Pa. St. 344 [53 Am. Dec. 474]; and in numerous other cases, where estates-tail were held to have been created: *George v. Morgan*, 16 Id. 95; *Alpass v. Watkins*, 8 T. R. 518; *Goodright dem. Lisle v. Pulkin*, 2 Stra. 729; *Wright v. Pearson*, 1 Eden, 119; *University v. Clifton*, Id. 424; *Measure v. Gee*, 5 Barn. & Ald. 910; *Frank v. Stovin*, 3 East, 548; *Lewis ex dem. Osmond v. Walters*, 6 Id. 336.

We are of opinion that this cause was rightly decided in the common pleas.

Judgment affirmed.

WILL MADE BEFORE PASSAGE OF LAW, where testator dies after enactment of law, is affected by such law: *Criley v. Chamberlain*, 30 Pa. St. 166, citing the principal case.

DEVISE SIMILAR TO THAT IN PRINCIPAL CASE CONSIDERED and held to pass estate-tail: *Potts's Appeal*, 30 Pa. St. 172.

DEVISE TO ONE FOR LIFE, WITH REMAINDER TO HEIRS OR HEIRS OF BODY, gives fee-simple or fee-tail in land: *Bush's Appeal*, 33 Pa. St. 87; *McKee v. McKinley*, Id. 93; *Thornton v. Krepps*, 37 Id. 392; *Mallack v. Roberts*, 54 Id. 150, all citing the principal case.

THAT ESTATES-TAIL ARE EMBRACED IN PENNSYLVANIA ACT of 1833 is denied, and the portion of the opinion in the principal case in regard thereto held to be merely a suggestion or dictum and wrong, in *Guthrie's Appeal*, 37 Pa. St. 17; *Gable v. Daub*, 40 Id. 229; *Taylor v. Taylor*, 63 Id. 486; but Lowrie, J., who delivered the opinion in the principal case, in a dissenting opinion to *Reinhart v. Lantz*, 37 Id. 488, reaffirms his former opinion that such estates are embraced within the provisions of the act, and descend to the heirs generally, and not to the eldest son.

BEAUPLAND v. McKEEN.

[28 PENNSYLVANIA STATE, 124.]

PARTY IS ESTOPPED TO DENY RIGHT IN EXISTENCE OF WHICH HE INDUCED PURCHASER TO CONFIDE, and on faith of which he purchased, and a subsequent purchase by the former and assertion of a better title to the land is void where he encouraged the vendee to buy the land, acted as his agent in the purchase, adjusted the lines, paid the taxes, and received a commission on the purchase money.

OMISSION TO ASSERT RIGHT WILL ESTOP PARTY ONLY WHERE SILENCE AMOUNTS TO FRAUD; but as to acts done, a different rule applies, and a party may be estopped without fraud, on the principle that between two innocent persons he whose acts occasioned the loss must suffer.

DEFENSE OF FAILURE OF TITLE TO PAYMENT OF PURCHASE PRICE OF LAND is extinguished if the party attempting to set up an adverse title is, by his acts toward the vendee at such sale, estopped from setting up such title.

POSSESSION TAKEN BY OWNER OF JUNIOR SURVEY OF INTERFERENCE with older and unoccupied survey, by erecting improvements upon and clearing and cultivating his land outside the lines of the interference, and using the balance of it, including the interference, as owners usually do their adjacent timber-lands, by taking fire-wood, fence-rails, or timber for the use of a saw-mill for a period of twenty-one years, will be such possession as would give title under the statute of limitations to the part within the lines of such interference. But simply occasional entries upon the interference for lumbering purposes will not constitute such a possession.

MEASURE OF DAMAGES FOR FAILURE OR DEFECT OF TITLE to part of land conveyed is the relative value which the part taken away bears to the whole, as fixed by the price agreed upon for the whole, subject, however, to proof by the parties that the part lost was of greater or less value from particular advantages or disadvantages. But the expense of improvements cannot be considered in estimating such damage.

ACTION to recover purchase price of land. The opinion states the facts.

Brown and Ihrie, for the plaintiffs in error.

Porter and Green, for the defendants in error.

By Court, **WOODWARD, J.** We have gone further in Pennsylvania in relieving purchasers of real estate from payment of purchase money, on the ground of defects and incumbrances, than courts of justice have gone in any other state or country where the common law obtains. We administer not only all equitable relief whilst the contract remains executory, but after it has been executed by a deed made and delivered, we give the purchaser, besides the full benefit of any covenants his deed may contain, the right to defend himself from payment of the purchase money, however solemn the instrument by which it is secured, if he can show a clear outstanding defect or incumbrance, unless he expressly assumed the risk of it.

In England, and in most of the states around us, the equitable right of the purchaser to detain unpaid purchase money depends on the covenants in his deed. He is not compelled to pay that which he would be entitled to recover back in damages by an action at law; but as his equity springs from breach of

a legal covenant, he has no title to relief where there is no covenant, or a covenant but no breach.

But with us the failure of consideration is the ground of relief, and neither covenants nor eviction are essential to it. In England, eviction is an indispensable ingredient of a claim for relief against payment of purchase money. Here it is sufficient that eviction may take place.

This is a very delicate ground on which to administer justice to vendors and vendees, for in determining the possibility of an eviction, we have not before us the paramount claimant on whose will and rights the liability to eviction depends. Possibly he has no rights, as would appear the moment he attempted to assert them, or if he have rights, it is possible he may never attempt to assert them; and in either case it would be against conscience and equity to allow the purchaser to keep the land on which so unsubstantial a cloud rests, and the price also which he agreed to pay to the party who put him into possession.

Not intending, however, to question any of the well-settled rules of law which prevail with us, it is sufficient for present purposes to say that this case lies far beyond any extent to which we have carried the doctrine of equitable relief against payment of purchase money.

What is this case in its general outlines? A well-paid agent of the plaintiff buys him a body of timber-lands in Luzerne county. He employs surveyors to define and settle the lines, and assists in person in the work. Having completed the purchase for his principal, settled lines, paid taxes, and exercised other acts of agency and ownership over the lands, he advertises them for sale, and proclaims to the world, "titles indisputable, and possession given immediately if required."

Within three months after thus offering the lands to the public, the defendants bought them of the plaintiff for twenty-seven thousand two hundred and fifty dollars, took possession of them, and paid all the purchase money, except one note for eight thousand six hundred and twenty-five dollars, for which this suit was brought. And what is the defense to this note? Nothing else than that the very party who acted as agent for the plaintiff, both in buying and selling these lands, has acquired a better title to part of one of the tracts. Williams has not, indeed, evicted the purchasers, nor even threatened to disturb them. The tract which he purchased did not belong to this body of lands—was a younger survey—and interferes only to the extent of one hundred and fifteen acres with one of the

tracts sold by the plaintiff to the defendants. There is not a fact or suggestion on this record to lead to the suspicion that Williams or Pearson & Williams intend to take away from the defendants, or even to claim the interference.

Then why should not the defendants pay? Because they may be evicted, and that, in Pennsylvania, is a defense. Impossible. The title of Pearson & Williams, if the best for the interference, can never disturb McKeen and Pursell, because they have estopped themselves from setting it up and asserting it. They were doubtless in possession of the Patterson tract whilst acting as agents of Beaupland; but let it be granted that they had no interest whatever in the tract, and that the title to it has been acquired since their agency ceased, the question then is, whether a party who stands by and encourages two several purchasers of the same land, receives a commission on the sale, surveys and adjust lines, and performs all necessary acts for the protection of the apparent title, can afterward buy up and assert a better title to part of the land. Surely he cannot until all distinctions between fraud and fair dealing come to be confounded. He is estopped from denying the right in whose existence he gave the purchaser reason to confide: 5 Watts & S. 209.

The rule is clear that mere silence will postpone only where silence was a fraud, and a fraudulent concealment of title cannot be imputed to one who was ignorant that he had any title to conceal, but positive acts stand on a different ground. For these his title may be postponed even without fraud, in accordance with an equitable principle of universal application, that where a loss must necessarily fall on one of two innocent persons, it shall be borne by him whose act occasioned it: *Per Gibson, C. J., in Robinson v. Justice*, 2 Penn. & W. 22 [21 Am. Dec. 407]. Though the ordinary effect of estoppel is confined to the persons of those to whom it attaches, yet where it arises upon the conveyance of land, it operates upon the estate apart from the person. Thus in *Rawlyn's Case*, 4 Co. 52, where A, having nothing in land, demised it by indenture to B for six years, the lease was good at the time as against the lessor, but when he obtained a subsequent term for twenty-one years in the same land, the term itself was bound by the estoppel, and the lease became good against all parties to whom the estate might subsequently come. So it was held in *Helps v. Hereford*, 2 Barn. & Ald. 242, that a fine levied by an heir who had no estate in the land at the time, either contingent or vested, bound the

estate by estoppel upon its subsequent descent from the ancestor. And see *Webb v. Austin*, 7 Man. & G. 701, and *Doe v. Oliver*, and the notes thereto, in 2 Smith's Lead. Cas., Am. ed., 620.

These were estoppels arising from conveyances, but we have held that a party may be estopped as effectually by matter in pais as by matter of record, which is a higher species of evidence than conveyances: *Martin v. Ives*, 17 Serg. & R. 864; *Commonwealth v. Moltz*, 10 Pa. St. 527 [51 Am. Dec. 499].

Without going further into the law of estoppel, and invoking only those familiar principles which we have often applied to agreed or consentable lines between adjacent estates, it is beyond question that, upon the evidence of Pearson & Williams's agency, that which was rejected by the court below as well as that which was admitted, they and all persons claiming the Patterson tract under them would be estopped from extending its lines beyond the boundary of the Edgerton survey. If, then, the Patterson survey was the better title—if, when McKeen and Pursell purchased the Edgerton tract, the Pine Forest Company might have taken away the interference from them—the moment that title vested in Pearson & Williams it inured to the benefit of Beaupland, and through him to McKeen and Pursell, and thereby extinguished all defense to the note in suit. Whatever hazards of loss they were exposed to when they made their note, they are exposed to none now, for the parties who encouraged them to invest money in that title have bought in the adversary title, and are restrained by a salutary rule of law from asserting it to their prejudice.

This view of the case was suggested to the court below by the second point submitted by plaintiff's counsel, but the court waived it with the remark that Williams's agency for Beaupland did not affect the Patterson tract if that title was complete before the Patterson tract came into possession of Williams, and they put the cause to the jury upon different grounds.

The judgment must be reversed not only because the true ground for ruling the cause was repudiated, but because the evidence of Williams's agency, which was rejected, was competent, and ought to have been admitted.

Had the court admitted that evidence, and ruled the case upon the second point of the plaintiff, there would have been an end of it; but, inasmuch as we cannot assume that the case on retrial will present the same aspect it exhibits on the present record, we must review the points taken by the court below, so that the cause may, if dependent on them, be properly tried.

The case involved an interference of surveys. The Edgerton tract, for which in part the note was given, was the oldest survey, and the Patterson tract, now owned by Pearson & Williams, and interfering with the Edgerton to the extent of one hundred and fifteen acres, is the younger survey. There was an ancient possession on the Patterson tract not within the interference, but at a well-known point on the Easton and Wilkesbarre turnpike, called Bear creek. Here was a tavern-house and saw-mill from an early day, and a few acres of land cleared and cultivated. There had been no actual possession of the Edgerton tract. The learned judge, following the doctrine which originated with *Waggoner and Hastings*, 5 Pa. St. 300, and was recognized by two judges of this court in *Hole v. Rittenhouse*, 19 Id. 306, the first time that case appeared in this court, ruled that the possession of the Patterson tract at Bear creek was in law a possession of all the land within the lines of the survey, and if kept up for twenty-one years would give title to the whole tract. This established the Patterson title to the interference, and to that extent failure was shown in the consideration of the note in suit.

It is due to the memory of the learned judge, now no more, to state that the cause was tried before *Hole v. Rittenhouse*, *supra*, had its final ruling in this court as reported in 25 Pa. St. 491. In that case the doctrine of *Waggoner and Hastings*, *supra*, was exploded in an opinion, of which I may be permitted to say that any attempt to make the reasoning stronger or clearer than it is would be extravagant presumption.

With excellent good taste, the counsel for the defendants in error do not resist the ruling in *Hole v. Rittenhouse*, *supra*, the last time it was here, nor attempt to justify the position assumed by the court below on the trial of this cause. They agree that *Waggoner and Hastings*, *supra*, and its cognates are not law, and that it was a mistake to rest this cause on them; but they maintain that the result arrived at by the court below was right, because the evidence clearly showed that there had been actual possession of the interference for more than twenty-one years by those claiming title to the Patterson tract. This is denied on the other side, and it is said the only possession of the interference was by timber-stealers, who were unconnected with the Patterson title. This involves a question of fact to be decided by a jury.

If the fact be that those in possession of the Patterson tract at Bear creek made such use of the interference as owners ordi-

narly make of their adjacent timber-lands—taking fire-wood, fence-rails, or lumber from it for the use of their mill, for a period of one and twenty years, this would be possession, and would give title under the statute of limitations. Constructive possession would not oust the real owner of the Edgerton survey, but actual possession would, and such acts as I have enumerated have repeatedly been held to constitute actual possession. The marking of lines, and payment of taxes, would be additional assertions of ownership which would help to make out the actual possession. But if this was mere marauders' ground—if anybody who wanted to get lumber manufactured at the Bear creek mill went upon the interference to take timber, without regard to the Patterson title—if, in a word, the only acts of possession were occasional entries for lumbering purposes—they would not constitute the possession essential to title: *Sorber v. Willing*, 10 Watts, 141.

If on the next trial this question of fact should be so found as to give title, under the statute of limitations, to the owners of the Patterson tract, the next inquiry will be, What is the measure of damages which the defendants will be entitled to defalk against their note?

The rule that applies to damages on breaches of covenant of title is applicable here; and, according to that, either party may produce evidence to show the relative value which the part taken away bears to the whole, and this, as was said by Kent, chief justice, in *Morris v. Phelps*, 5 Johns. 56 [4 Am. Dec. 323], operates with equal justice as to all the parties to the conveyance. In *Lee v. Dean*, 3 Whart. 331, Judge Kennedy reasserted the rule with great emphasis as applicable to a case untainted with fraud.

The relative value of the part to the whole is to be estimated with regard to the price fixed by the parties for the whole. The whole purchase being assumed to be worth the price agreed on, what part of the price would fairly be represented by the part taken away? This was the question in *Stehley v. Irvine*, 8 Pa. St. 500, though the case is so defectively reported that the point ruled is scarcely discernible.

It was competent for either party, under this rule, with its limitation, to give evidence of the peculiar advantages or disadvantages of the part lost, and the inquiry should not be unduly restrained whilst it is confined to the proper point; but undue latitude was allowed to it when the cost of erecting a saw-mill on an adjoining tract was gone into. We think there

was error in admitting all the evidence in relation to the cost of the water-mill, dam, plank road, and other improvements of the defendants. We have already intimated that the court erred in rejecting the receipts of Pearson & Williams for moneys paid them by the plaintiff for their agency. The receipt of Hoyt also ought to have been admitted.

There was no error in admitting Ford's deposition, for what he swore to were open and notorious facts occurring in the presence of others, and not confidential communications from client to counsel, such as are privileged in law.

Having now alluded sufficiently to the several errors relied on, the judgment is reversed, and a *venire facias de novo* awarded.

ESTOPPEL BY SILENCE, MISREPRESENTATION AND CONCEALMENT: See *Titus v. Morae*, 63 Am. Dec. 665, and cases in note 670. Silence without knowledge works no estoppel: *Hill v. Epley*, 31 Pa. St. 334, citing the principal case. Party leading another to purchase by means of misrepresentations is estopped to deny the existence of the facts in which he induced the other to confide, or to set up an adverse claim to the property or right: See *Phillips v. Blair*, 38 Iowa, 654; *Leffman v. Flanigan*, 5 Phila. 161; *McKeen v. Beaupland*, 35 Pa. St. 490 (arising out of the same facts as the principal case); *Woods v. Wilson*, 37 Id. 384; *Youngman v. Linn*, 52 Id. 417; *Milligar v. Sorg*, 55 Id. 225; *Chapman v. Chapman*, 59 Id. 218; *Lawrence v. Luhr*, 65 Id. 241.

VENDOR AND VENDEE, MEASURE OF DAMAGES BETWEEN, for failure of title: See *Fernander v. Dunn*, 65 Am. Dec. 607, and note 608. The principal case is cited in *Dalton v. Bowker*, 8 Nev. 198; *Murphy v. Richardson*, 28 Pa. St. 292; *Rosenberger v. Keller*, 33 Gratt. 493, to the point that the measure of damages ought to be the purchase price for the whole if title fails as to the whole, or a proportion of the purchase price for the part as to which title fails unless such part is proved to be more or less valuable.

POSSESSION FOR TWENTY-ONE YEARS of interference, by taking fire-wood, etc., will give title under the statute of limitations: See *Young v. Herdie*, 55 Pa. St. 175; *Peyton v. Barton*, 53 Tex. 303, where the principal case is cited on this point; and *Hole v. Rittenhouse*, 37 Pa. St. 120, where it qualifies the proposition as stated in the principal case.

BEACH v. SCHOFF.

[28 PENNSYLVANIA STATE, 195.]

NAVIGATOR ON STREAM WHICH IS PUBLIC HIGHWAY MAY REMOVE OBSTRUCTION, as raft or the like, in the most speedy way, if the exigencies of the case require it, and is only liable for injury thereby where he is guilty of gross negligence or willful destruction. Party removing the obstruction is bound to use the same degree of caution that a careful man would exercise in reference to his own property.

WHERE LOSS MUST FALL ON ONE OF TWO INNOCENT PERSONS, it should be borne by him whose accident was the cause of it.

TRESPASS. The facts are stated in the opinion.

Monroe, for the plaintiff in error.

Ryan, for the defendant in error.

By Court, KNOX, J. Winthrop Beach, the plaintiff in error and defendant below, in running lumber down the Cowanesque river, in Tioga county, found a raft of spars belonging to the plaintiff lodged on a mill-dam. Alleging that the spars prevented his passing over the dam with safety, he removed two of them, one of which was lost. To recover for the lost spar and the expenses incurred in putting the raft again in order, this action of trespass was brought.

Upon the trial the defendant's counsel requested the court to charge the jury:

1. That if the plaintiff by his negligence contributed to the injury, he could not recover, although the defendant might have been also guilty of negligence.

2. That if the jury believed from the evidence that the plaintiff's raft was run and left by him in the course for three or four weeks, and until the next freshet, and the defendant in descending the river with his rafts was obstructed by the plaintiff's raft, the defendant had the right to remove the plaintiff's spars to effect a passage, and in doing so, is not liable for the loss of plaintiff's spars, unless he was guilty of gross or willful negligence.

To the first proposition the court of common pleas answered that it was not applicable to the case.

To the second, that the defendant had the right to remove the spars from the course, but in so doing he was "bound to exercise the same care in removing it as an ordinarily careful man would have used in the removal of his own property from the same or a similar position."

We see nothing in the case which convicts the court of error in refusing to apply the well-established principle that no recovery can be had when the loss springs from mutual negligence. But we are of opinion that there was error in the instruction that the defendant in removing the spars was bound to the same care that an ordinarily careful man would exercise in removing his own property from a similar position.

The Cowanesque river is a public highway, and as such is open to the use of the public for the purposes to which it is applicable. It can only be used for descending navigation in times of high water, which usually lasts but for a short time. During the

period of navigation it is very important to the lumber trade that the course should be kept free from obstruction; and where one descending the stream finds it blocked up so as to arrest his progress, he may undoubtedly remove the obstruction, and that too in the most speedy manner, if the exigencies of the occasion require it. At the most, he is only liable for gross negligence or willful destruction in removing the obstruction. Any other rule might result in loss to one without fault, for the purpose of protecting the person who by accident or otherwise had caused the obstruction.

“Where a loss must fall on one of two innocent persons, it should be borne by him whose accident was the cause of it.” *Philiber v. Matson*, 14 Pa. St. 307. True, the defendant was not justified in doing unnecessary injury to the plaintiff’s property; but he had the right to protect his own property, even at the expense of loss to the plaintiff’s. And this was denied to him under the rule applied upon the trial; for if he was bound to act as the owner of the spars would act under the same circumstances, the right of preference was gone.

The defendant was entitled to an affirmative answer to his second point, and because he did not get it, the judgment must be reversed.

Judgment reversed, and *venire de novo* awarded.

STREAM AS HIGHWAY, OBSTRUCTIONS IN, AND RIGHT TO REMOVE: See *Porter v. Allen*, 65 Am. Dec. 750, and note collecting the prior cases in the series.

WHERE ONE OF TWO INNOCENT PARTIES MUST SUFFER, he who contributed most, or whose accident resulted in the injury, must bear the loss: See *Ruiz v. Norton*, 60 Am. Dec. 618.

SIEGEL v. CHIDSEY.

[28 PENNSYLVANIA STATE, 279.]

FACT THAT MONEY WHICH WAS OBTAINED ON PERSONAL CREDIT OF MEMBER OF FIRM was used by the firm and for its exclusive benefit will not of itself make the firm liable to the creditor for such debt, but would be a good consideration to support a subsequent promise by the firm to pay the debt.

CONFESSION OF JUDGMENT BY PARTNERS TO CREDITOR, on promise to pay the individual debt of a member of the firm for money borrowed by him and used by and for the exclusive benefit of the firm, is not the application of partnership effects to the private debt of a member of the firm, but the honest assumption by the partners of a debt created for their joint benefit, and which in equity and conscience they are equally bound to pay.

ASSUMPTION BY FIRM OF DEBT OF MEMBER FOR MONEY BORROWED FOR EXCLUSIVE USE OF FIRM is not a fraudulent transaction as to the partners, because they all assent to it, and not as to the firm creditors, if they have no lien on the partnership effects, because their equities must be worked out through the partners themselves.

INSOLVENCY DOES NOT OF ITSELF WORK DISSOLUTION OF PARTNERSHIP, nor divest partners of their authority over firm property.

CONFESSION OF JUDGMENT TO BONA FIDE CREDITOR IS NOT FRAUDULENT DISPOSITION OF INSOLVENT ESTATE, even if it have the effect of giving him a preference over other creditors.

FEIGNED issue to determine the right to proceeds of the personal property of an insolvent partnership. The opinion states the facts.

Brown and Ihrie, for the plaintiff in error.

Green, for the defendant in error.

By Court, **WOODWARD, J.** Unquestionably the debt of John Siegel, jun., to his father, John Siegel, sen., was originally an individual, and not a partnership, debt. The paper taken for it proves it such, and the verdict has fixed it as the debt of one partner. But it is equally clear that the money, though obtained on the personal credit of Siegel, jun., went into the partnership funds, and was used for the exclusive benefit of the firm of Field & Siegel. Now, although this circumstance would not of itself make the firm liable to the creditor, *Graeff v. Hitchman*, 5 Watts, 454; *Clay v. Cottrell*, 18 Pa. St. 412; yet it would be a consideration to support the firm's subsequent promise to pay. The single bill of the twenty-third of March, 1852, was such a promise. It was an express undertaking on the part of the firm, upon a sufficient consideration, to pay this debt out of the partnership assets. It became at that moment a partnership debt for all intents and purposes.

This was not the application of partnership effects to the private debt of one member of the firm, but it was the honest and fair assumption by both members of the firm of a debt which had been created for their benefit, and which in equity and conscience they were both equally bound to pay. Field swore that the money had always been treated as a partnership debt; that the interest was paid out of the drawer of Field & Siegel, and that we gave the note of March, 1852, for that of August, 1847. The creditor advanced his money for the purposes of the firm—it went to their use, it was represented in the effects which they possessed, and both members of the firm, with a full knowledge of the facts, concurred in giving it the form of a partnership debt. It is impossible to think of such a transaction as fraudu-

lent. Fraudulent as to whom? Not as to Field, because he assented to all that was done, and all the authorities agree that where a creditor receives partnership paper from one partner in discharge of his separate debt he will repel the presumption of fraud by showing that it was given with the consent of the other partners: See Story on Part. 202, and the cases cited in notes.

Nor could it be a fraud on partnership creditors, for they have no lien on partnership effects, and whatever equities are available to them must be worked out through the partners. We held, in *Baker's Appeal*, 21 Pa. St. 82, that the right to confine a partner, or those who claim under him, to his interest in the surplus, after payment of the partnership debts, is an equity which rests in the other partners alone, and not in the creditors of the firm; and therefore, that where one partner sells his interest in the firm to another partner, upon an express engagement of the latter to pay the partnership debts, he may make a different disposition of the assets, and leave the creditors only his personal responsibility. This is a much stricter rule, as to the equities of partnership creditors, than any that we have occasion to invoke in this case.

If as between the partners there was no equity to forbid the assumption of Siegel's debt, the creditors of the partnership could have none. If it was not a fraud on the firm, it was not a fraud against the creditors of the firm. But that it was not a fraud on the firm I have shown already, for both members assented to the assumption. And what possible equities can partnership creditors be thought to possess which do not belong equally to old Mr. Siegel? True, he advanced his money to his son, but it was for the partnership. It entered into the business of the firm, and purchased just as large a portion of the assets as he now claims to take out of the firm. What more did the money of any other creditor do? As partnership property has been acquired by means of partnership debts, it ought first to be applied to the discharge of them. This is the ground on which text-writers rest the primary claims of joint creditors, and it is evident that Siegel is as clearly on this ground as Chidsey. If not a joint creditor at first, he was only not so in form, and equity regards substance rather than form; but he became a joint creditor in form as well as substance before distribution commenced, or any counter legal rights had vested. He stands, therefore, a partnership creditor among partnership creditors.

But it is objected that he was made so—that his claim was

assumed by the firm after they were insolvent. The point put to and affirmed by the court was, that "if at the time of the giving this judgment note to John Siegel, sen., by Field & Siegel, the firm was insolvent," etc. Now, the jury could not fail to understand from the affirmance of this point that if Field & Siegel were unable to pay all their debts, they had no right to assume the debt to Siegel, sen. Is this law?

Under the statutes of bankruptcy, the judicial declaration of the fact relates back to the first act of bankruptcy, so that from that period the bankrupt is deemed divested of all of his property and effects, and, by operation of law, as soon as assignees are appointed, it is vested in them by relation from the same period. It is clear that after an act of bankruptcy partners could not pledge their effects to the payment of a debt of one of their number; but it was not made a point in this case, nor found by the jury that any act of bankruptcy had been committed before the twenty-third of March, 1852. Simple insolvency, however, without stoppage of payment, without an assignment, or any judicial process, does not work a dissolution of the partnership, nor divest the partners of their dominion over the partnership property. They may not make a fraudulent disposition of it, but the confession of judgment to a *bona fide* creditor, even though it have the effect of giving him a preference over other creditors, is not a fraudulent disposition of an insolvent estate.

It would not be questioned that an insolvent firm might make a valid sale of goods, or pay a debt, or make an assignment, or exercise the *jus disponendi* in any form that was consistent with good faith and fair dealing. Why, then, may they not confess a judgment to a *bona fide* creditor? The whole force of the argument on the part of Chidsey consists in the assumption that this was an application of partnership effects to the separate debt of one of the partners. If such an application by an insolvent firm would indeed be fraudulent as to partnership creditors (a conclusion which I am not prepared to admit), the assumption is unwarranted that this was a separate debt after the twenty-third of March, 1852. Regarded by both partners as essentially a partnership debt from the first, it became on that day a partnership debt in form and effect, and from that time to this Siegel, sen., has been a partnership creditor.

The only peculiarity which the record discloses is that he acquired, by superior diligence, the first lien on the debtors' goods. This he had a right to assert, and the court ought to

have rendered such answers to the points propounded as would have secured to him his rights.

There are several questions of evidence on the record, but the view that has been taken of the main points in controversy renders it unnecessary to notice the bills of exception to evidence.

The judgment is reversed, and a *venire de novo* awarded.

PARTNERSHIP AND INDIVIDUAL CREDITORS, RIGHTS AND PRIORITIES OF: See *Coover's Appeal*, post, p. 149, and note, where cases are collected.

FACT THAT MONEY BORROWED BY PARTNER, FOR WHICH HE GIVES HIS INDIVIDUAL NOTE, was applied to the purposes of partnership business, does not make such note a firm debt: *North Pennsylvania Coal Co.'s Appeal*, 45 Pa. St. 185, citing the principal case.

CONFESSION OF JUDGMENT TO BONA FIDE CREDITOR, EVEN BY INSOLVENT, IS NOT FRAUDULENT DISPOSITION OF ESTATE: *Witmer's Appeal*, 45 Pa. St. 462, citing the principal case.

PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY v. COWELL.

[28 PENNSYLVANIA STATE, 829.]

WHERE DIRECTOR OF RAILROAD COMPANY SUBSCRIBED for additional shares of stock for and in the name of a certain large stockholder in the corporation, to relieve the company from embarrassment, such stockholder being at the time a resident of a foreign country, and immediately notified the latter of what he had done, and the stockholder never made any reply, and the accruing dividends on his other stock were applied in payment of the additional shares, and seven years afterward he demanded and sued for the dividends, and claimed that the subscription for the additional stock was unauthorized, it was held that his long silence, after being informed of the facts, was evidence to be submitted to the jury of his ratification of the act of such director in making the subscription.

LONG SILENCE TO CONSTITUTE RATIFICATION OF UNAUTHORIZED ACT is not confined to cases where the relation of principal and agent exists between the person doing the act and the person affected by it; such conduct is evidence of a ratification, more or less expressive according to the circumstances under which it takes place.

RATIFICATION OF UNAUTHORIZED ACT OF STRANGER may not be implied as a conclusion of law from the silence of the party affected by the act, but it does not follow that it is incompetent to be submitted to the jury; and it may, as a circumstance, with others, be submitted to the jury as facts from which they may imply such ratification.

DIRECTOR OF RAILROAD COMPANY STANDS IN FIDUCIARY RELATION to stockholder, and in acting for him in his absence, cannot be regarded as a stranger.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST ACTION FOR DIVIDENDS of stockholder in corporation until after demand and refusal, or notice that the stockholder's right to dividends is denied.

ACTION by stockholder against railroad company for dividends due on shares of stock. Cowell was a large holder in the stock of the defendant company. He himself had gone to reside in a foreign country. One of the directors of the corporation, during his absence, for and in his name, subscribed for additional shares of stock to relieve the company from embarrassment, and notified him of his action, but Cowell never answered in any manner. During his absence the dividends accruing on his other stock were applied in payment of the additional shares. Seven years after the subscription for the additional stock Cowell demanded his dividends on his original subscription, and denied the subscription to the latter shares as unauthorized. The above facts, together with his long silence, were offered as evidence of his ratification of the said director's action in making such subscription for the additional shares. The remaining facts appear in the opinion.

St. G. T. Campbell, for the plaintiff in error.

H. J. Williams, for the defendant in error.

By Court, **WOODWARD, J.** The question presented by the first error assigned is not whether the evidence offered and rejected proved the plaintiff's ratification of Fisher's subscription, but whether it tended to prove it.

Suppose the court had admitted the evidence, and the jury had found the plaintiff's assent and ratification, could he have expected us to reverse the judgment on the ground that a question of fact had been submitted and found without any evidence?

Could it have been said that the facts set down in the bill of exception, fully proved, were no evidence of ratification; that they were so entirely irrelevant as to be unworthy of consideration by rational minds in connection with such a question; that that question stood just as far from demonstration after such evidence as before?

Unless this could have been said, and must have been said in the event supposed, the judgment now before us must be reversed; for the question here is, in essence and substance, exactly the same as it would have been then.

If this evidence might have satisfied the jury, that is, if it were of a quality to persuade reasonable men that Cowell did assent to Fisher's assumed agency after he had full knowledge of what had been done, it should have been admitted. The question in the cause was for the jury, and not the court. But

the fact to be inquired for, like all mental conditions and operations, could be established only inferentially. We judge of the mind and will of a party only from his conduct, and if he have done or omitted nothing which may fairly be interpreted as indicative of the mental purpose, there is indeed no evidence of it for either court or jury; but if his conduct, in given circumstances, affords any ground for a presumption in respect to the mental purpose, it is for a jury to define, limit, and apply the presumption.

The most material circumstance in the offer was the silence of Mr. Cowell. Fully informed about the last of the year 1848 as to what had been done in his name, and the motives and reasons for doing it, he did not condescend to reply for nearly seven years. It is insisted that this fact, even when taken in connection with the other circumstances in the offer, was no evidence of his intention to assent to the new subscription.

The argument admits that where the relation of principal and agent has once existed, or where the property of a principal has with his consent come into the hands and possession of a third party, the principal is bound to give notice that he will not sanction the unauthorized acts of the agent, performed in good faith and for his benefit; but it is said, and truly, that Mr. Fisher had never been an authorized agent of the plaintiff for any purpose, and that the plaintiff's property had never been intrusted to him. It is on this distinction that the learned counsel sets aside the case of *Kentucky Bank v. Combs*, 7 Pa. St. 546, and indeed, all of the authorities relied on by the defendants.

I do not understand counsel to mean that there can be no valid ratification unless one of the conditions specified—either prior agency or possession of principal's property—has existed, but that silence after knowledge of the act done is evidence of ratification only in such cases. It must be admitted that the act of a mere stranger or volunteer is capable of ratification, for all the authorities are so; but the argument is that the silence of the party to be affected, whatever the attending circumstances, cannot amount to ratification of the act of a stranger.

In *Wilson v. Tumman*, 6 Man. & G. 242, Chief Justice Tindal, on the authority of several old cases, considered that the effect of a ratification was dependent on the question whether the person assuming to act had acted for another, and not for himself. The act, it would seem, cannot be ratified unless it was done in the name of the person ratifying. *Ratum quis habere*

non potest, quod ipsius nomine non est gestum. And the general rule is thus expressed in the Digest, 50: *Si quis ratum habuerit quod gestum est, obstringitur mandati actione.*

If, then, the principle of law be that I can ratify that only which is done in my name, but when I have ratified whatever is done in my name I am bound for it, as by the act of an authorized agent, it is apparent that my silence, in view of what has been done, is to be regarded simply as evidence of ratification, more or less expressive, according to the circumstances in which it occurs. It is not ratification of itself, but only evidence of it, to go to the jury along with all the circumstances that stand in immediate connection with it. Among these, the prior relations of the parties are very important. If the party to be charged had been accustomed to contract through the agency of the individual assuming to act for him, or had intrusted property to his keeping, or if he were a child or servant, partner or factor, the relation, *conjunctionis favor*, would make silence strong evidence of assent.

On the other hand, if there had been no former agency, and no peculiarity whatever in the prior relations of the parties, silence—a refusal to respond to a mere impertinent interference—would be a very inconclusive, but not an absolutely irrelevant, circumstance. The man who will not speak when he sees his interests affected by another must be content to let a jury interpret his silence.

It is a clear principle of equity that where a man stands by knowingly and suffers another person to do acts in his own name, without any opposition or objection, he is presumed to have given authority to do those acts. *Semper, qui non prohibet pro se intervenire, mandare creditur*: Story's Agency, sec. 89.

We do not apply the full strength of this principle when we rule that the plaintiff's silence, in connection with the circumstances offered, was evidence fit for the consideration of a jury on the question of ratification. If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it is to say there can be no implied ratification of an unauthorized act—or at the least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar

contract for himself; and if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means.

For these reasons, the distinction on which the argument for the defendant in error rests seems to us to be too narrow.

The prior relations of the parties lend great importance to the fact of silence, but it is a mistake to make the competency of the fact dependent on those relations. I am aware that Livermore cites with approbation (p. 50) the opinion of civil-law writers, that where a volunteer has officiously interfered in the affairs of another person, and made a contract for him without any color of authority, such other person is not bound to answer a letter from the intermeddler, informing him of the contract made in his name, nor is his silence to be construed into ratification. But it is to be remembered that such writers are not laying down a rule of evidence to govern trials by jury, but are declaring rather the effect upon the judicial mind of the party's silence. It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may imply it. Because evidence does not raise a presumption so violent as to force itself upon the judge as a conclusion of law, is the evidence therefore incompetent to go to a jury as ground for a conclusion of fact? No writer with a common-law jury before his eyes has ever maintained the affirmative of this proposition. If it could be established, it would abolish that institution entirely, and refer every question and all evidence to the judicial conscience.

But it is time now to remark that this case is far from being that of a mere volunteer or intermeddler. True it is that Mr. Fisher had not any proper authority to make the new subscription, but Messrs. Binney and Biddle, the friends and correspondents of the plaintiff, had consulted him in reference to the plaintiff's interests in this railroad company; and as a director of the company, he stood, in some sort, as a representative and trustee of the plaintiff, who was in a foreign country, and without any authorized agent here. The proposition that every stockholder should subscribe new stock to the extent of ten per cent was designed, and as the event proved was well designed, to retrieve the fortunes of the company, but it was necessary to its success that every stockholder should come into the arrangement. The emergency was pressing, and Mr. Fisher, manifestly acting in perfect good faith, made the subscription for the

plaintiff, which he believed the plaintiff would not hesitate to make if personally present.

When the plaintiff was fully informed that a sagacious financier, to whom his chosen friends and correspondents had referred his interests, and who stood in the fiduciary relation of a director, had pledged him for a new subscription, which circumstances seemed to justify and demand, I say not that he was bound by it, nor even that he was bound to repudiate it, but that his delay, for near seven years, either to approve or repudiate, was a fact fit to be considered by a jury on the question of ratification. The subscription was made in the plaintiff's name, and accepted by the company as his, and it does not appear that they knew Fisher was acting without authority. The offer was to show that it was highly beneficial to the plaintiff. It was then such an act as is capable in law of being ratified. The plaintiff might make it his own by adoption. Did he adopt it? He did if he ever gave it mental assent. How could the company show assent, by anything short of a written agreement, if not by evidence of the nature of that in the bill of exception? The medium of proof, where a mental purpose is the object of inquiry, must conform to the mode of manifestation. To say that you may prove assent, but may not give the circumstances in evidence from which it is to be implied, is to say nothing.

Strongly persuasive as we consider the offered evidence, we do not put our judgment so much upon the strength as upon the nature of it. We think it was calculated to convince a jury that the plaintiff did indeed assent to and approve of what Mr. Fisher had done in his behalf, and therefore it should have been received and submitted.

If they should find from it the assent and ratification of the plaintiff, the subscription became, as between him and the company, a valid contract, and on his failure to pay the installments, the company had a right to apply thereto the accruing dividends on his old stock.

When he pays what remains unpaid on the installments, he will be entitled to his certificates of stock.

The defense under the statute of limitations was not well taken. It may be well doubted whether under our acts of assembly any incorporated company can set up the statute of limitations against a stockholder's dividends. It certainly cannot be done until after a demand and refusal, or notice to a shareholder that his right to dividends is denied. But here, so

far from such notice having been given, the company recognize the plaintiff's right to the dividends, and claim to have applied them to his use. The statute can have no place in such a defense.

The judgment is reversed, and a *venire de novo* awarded.

ESTOPPEL BY SILENCE, MISREPRESENTATION, OR CONCEALMENT: See *Titus v. Morse*, 63 Am. Dec. 665, and cases in note 670; *Beaupland v. McKean*, ante, p. 115.

RATIFICATION OF UNAUTHORIZED ACTS OF AGENCY, what constitute, and effect of silence as: See *Flemming v. Marine Ins. Co.*, 33 Am. Dec. 33, and cases in note 36. The principal case is cited to the point that silence of the party affected by the acts, with knowledge of what has been done for him, amounts to a ratification of the unauthorized acts, in *Haggerty v. Juday*, 58 Ind. 158; *Massey v. Insurance Co.*, 3 Phila. 202; *London & S. F. Soc. v. Hagerstown Bank*, 36 Pa. St. 503; *Hall v. Vanness*, 49 Id. 464.

WHERE CLAIM IS NOT PAYABLE UNTIL DEMAND, the statute of limitations does not commence to run until such demand: *Girard Bank v. Penn Township Bank*, 4 Phila. 105.

WOODRING v. FORKS TOWNSHIP.

[28 PENNSYLVANIA STATE, 255.]

OWNER OF LAND THROUGH WHICH PUBLIC ROAD RUNS may cut a passage across the road for the purpose of draining his land or leading water to his mill, because the land is his own; but in so doing, he must not injure the public easement, and to preserve it, must construct bridges over such ditches where they cross the road, and must keep the same in repair. And a subsequent owner who continues such ditches is bound by such duties, and liable for repair of such bridges.

PROCEEDINGS BY INDICTMENT, AND FOR STATUTORY PENALTY FOR OBSTRUCTING PUBLIC ROAD, are designed more as punishments for offenses than as remedies for the injury, and will not preclude the public from repairing the road in the first instance, and then bringing actions to recover the cost thereof from the party bound to make repairs.

TOWNSHIP MAKING REPAIRS TO PUBLIC ROAD may sue the owner of the adjoining land who is liable therefor, notwithstanding the work was done on the credit of the township, and was not actually paid for at the time of suit brought.

WHERE SUIT WAS ORIGINALLY BROUGHT BEFORE JUSTICE OF PEACE, and on appeal the parties went to trial without objection, on a declaration for "money had and received," all objections to the form of action of jurisdiction of the justice are considered as having been waived.

INDEBITTATUS ASSUMPSIT to recover the cost of repairing certain bridges. The defendant was a mill-owner. His predecessors in interest in such mill had dug ditches across the public

road adjoining the mill for the purpose of conducting water to the mill, and had placed bridges over such ditches and kept them in repair. The defendant, however, failed to keep the bridges in repair, and the township, being bound to see that the roads were in good order, therefore repaired such bridges, and now brings this action to recover the cost of such repairs. The further facts appear in the opinion.

Green, for the plaintiff in error.

J. M. Porter and M. Goepp, for the defendant in error.

By Court, *Lewis, C. J.* There is no act of assembly authorizing the court of common pleas of Northampton county to enter judgment *non obstante veredicto*, on a point of law reserved at the trial. But as the judgment is to be reversed for error in the solution of the point reserved, it is not necessary to decide the question whether such a judgment can be entered without an act of assembly conferring the power.

We are to take it as settled by the verdict that the two public highways were in existence before the mill-races were dug across them; that the said races were dug for the benefit of the mill, by the former owner of it, and that they are continued by the defendant below for the same purpose. We are also to assume that the bridges have heretofore been kept in repair by the former owners of the mill. From these facts, an agreement to keep them in repair may be implied. A man who owns soil on which the public have a highway has a right to enjoy his property in every way that may promote his interest or convenience, so that he takes care not to injure the public easement. *Sic utere tuo ut alienum non laedas*, is the maxim which applies in such cases. He may cut a passage across the road for the purpose of draining his land, or leading water to his mill, because the land is his own, and he may use it for all legitimate purposes. But as he has no right to injure the public easement, he is bound, in order to preserve that right, not only to construct bridges over the ditches where they cross the highways, but also to keep them in repair. The duty of keeping such bridges in repair is as imperative as the original obligation to construct them. He could not be permitted to cut the ditch without erecting the bridge. He is bound to keep the bridge in repair, "because he erected it for his own benefit." *Pur ceo que il ceo erect pur son benefil demesne: Bowbridge and Channel Bridge v. Le Prior de Stratford*, Temp. 8 Edw. II., cited in Rolle's Abr. 363, tit. Bridges; *Perley v. Chandler*, 6 Mass. 454 [4 Am. Dec. 159]; *Dygert v.*

Schenck, 23 Wend. 446 [35 Am. Dec. 575]. It follows from these principles that a subsequent owner of the land, who continues a watercourse across a highway, for the use of his mill, and thus renders a continuance of the bridge necessary, is liable for the repairs of the bridge. There was, therefore, error in giving judgment for the defendant on the point reserved.

The act of the sixth of April, 1802, 3 Smith's Laws, 512, imposing a penalty for committing a nuisance in the highway, has never been construed to supersede the punishment by indictment at common law: *Kelly v. Commonwealth*, 11 Serg. & R. 345. The act of thirteenth of June, 1836, sec. 68, expressly preserves the latter remedy in addition to the other. But those proceedings are designed more as punishment for offenses than remedies for the injuries caused by them. They do not, therefore, preclude the public from repairing the highway in the first place, and then bringing an action to recover the expenses of such repairs against the party who is liable for them. It is the duty of supervisors to keep the roads and township bridges in repair. The public interest requires that this duty be promptly performed. The people are not to be obstructed in their right of passage until the termination of litigation with a wrong-doer. The obligation to keep the roads and bridges in repair gives the township a right of action against all persons whose neglect of duty has rendered the services of its supervisors in this respect necessary: *Pottsville Borough v. Norwegian Township*, 14 Pa. St. 543. It is not necessary that the township should prove that the expense of the repairs was paid before suit brought. It is sufficient that the work has been done on the credit of the township. The defendant has nothing to do with the question whether the township has been able to pay its debts or not. A stranger, who is under no obligation to repair the bridges, could not recover from the defendant for expenses voluntarily incurred. The creditors of the township, for work done at the request of the supervisors, are strangers and volunteers, so far as regards the defendant below. They could maintain no action against him for these services. He may therefore feel perfectly safe in paying the just demand of the township.

But it is supposed by the defendant in error that the form of the action, and the want of jurisdiction in the justice, present objections to the plaintiff's recovery. It must be remembered that when the cause came into the common pleas, by appeal, the parties went to trial without objection, on a declaration for "money had and received," without any regard to the true

nature of the action. Such a proceeding is a waiver of all objections, either to the form of the action or to the jurisdiction of the justice. It is in the nature of an amicable action, with an agreement to waive all such questions, and to try the case on its merits.

We perceive no reason why the plaintiff in error should not have judgment upon the verdict. But as the defendant below may have grounds for a writ of error, we do not enter the final judgment against him here; but reverse the judgment for the defendant below, and remit the record for further proceedings according to law.

Judgment reversed and *procedendo* awarded.

OWNER OF LAND ADJOINING HIGHWAY MAY CUT DITCH ACROSS ROAD, but if he do so, he must, by bridging or otherwise, make the highway safe for travel, as before: *Dygert v. Schenck*, 35 Am. Dec. 575; *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 137, citing the principal case.

OBJECTIONS TO FORM OF ACTION ARE WAIVED BY GOING TO TRIAL without raising them: *Stamer v. Nass*, 3 Grant Cas. 241, citing the principal case.

LLOYD v. LYNCH.

[28 PENNSYLVANIA STATE, 419.]

PURCHASE BY TENANT IN COMMON OF OUTSTANDING TITLE inures to benefit of all his co-tenants.

TENANT IN COMMON CANNOT ACQUIRE INDEPENDENT TITLE AGAINST HIS CO-TENANTS, where the land held in joint tenancy is sold at a treasurer's sale for non-payment of taxes, by taking an assignment of the purchaser's deed before the time for redemption has expired.

TRUST IS NOT CREATED IN FAVOR OF SON OF VENDEE OF LAND by a mere declaration of the vendee, at the time of making the purchase, that "he was going to buy the land for his son," if there is no further proof of any agreement to do so, nor any evidence that the son furnished the money to pay for it.

RECITAL IN DEED OF PAYMENT OF PURCHASE MONEY is no evidence of the fact of its payment as against third persons.

PARTY CLAIMING AS BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION PAID, without notice of a trust, must affirmatively prove the payment of the consideration by other evidence than the receipt upon the deed.

EXECUTMENT. The facts are stated in the opinion.

Hoffius, for the plaintiff in error.

Blair, for the defendant in error.

By Court, Lewis, C. J. On the seventh of October, 1841, James Ross and Peter Collins, being then the owners of the land in controversy, entered into a written contract to convey it to Barnabas Farrel, in consideration of the sum of three hundred and seventy-five dollars. The sum of one hundred and sixty-eight dollars was paid by Barnabas Farrel at the execution of the article. The residue was to be paid in installments, the last of which became due on the first of May, 1843. Barnabas Farrel died on the twenty-fourth of October, 1841, leaving three children, Thomas, Catharine, and Elizabeth. This ejectment was brought to recover the share which descended to Catharine as the heir of her father.

The defense is founded on a conveyance of the seventh of February, 1844, by James Ross and Peter Collins to Thomas Farrel, on his securing the unpaid portion of the purchase money due on the contract; a treasurer's deed of the twenty-second of August, 1846, to John Armitage, for taxes assessed for the years 1844 and 1845; an assignment of the last-mentioned deed by Armitage to Thomas Farrel on the ninth of December, 1846; and a conveyance from Thomas Farrel to Gilbert L. Lloyd on the first of July, 1854. Peter Collins testifies that when Barnabas Farrel was looking at the land, before the contract was made, he said he was "going to buy it for his son," and adds that that was the reason why he and Ross "made the deed to Thomas Farrel" several years after the death of Barnabas Farrel. This evidence is in conflict with that of James Ross; but, taking it for truth, it is entirely insufficient to create a trust in favor of Thomas Farrel. There was no evidence that the hand-money paid at the execution of the contract belonged to Thomas Farrel. On the contrary, the evidence is that Barnabas at that time declared that he "had money enough to pay for it;" that he had "money from Spang's works." He took the contract in his own name. The mere declaration of a vendee that he intends to buy for another, without evidence of any previous agreement to do so, or of any advance of money for the purpose, raises no trust which can be supported in equity: *Robertson v. Robertson*, 9 Watts, 32; *Sidle v. Waters*, 5 Id. 391; *Bear v. Whisler*, 7 Id. 147.

Thomas Farrel, on the death of his father, became a tenant in common with his two sisters. Independently of his duty as a brother, his obligations to his sisters, as a tenant in common with them, required that any title which he might obtain to the premises should inure to the benefit of all. This principle of

law gives to all the heirs of Barnabas Farrel the benefit of the two deeds acquired by one of them for the premises held in common: *Van Horne v. Fonda*, 5 Johns. Ch. 408; *Smiley v. Dixon*, 1 Pa. 439; *Weaver v. Wible*, 25 Pa. St. 272 [64 Am. Dec. 696]. Those deeds can only be used as a security to enforce contribution for the money paid for them.

But it is alleged that Gilbert L. Lloyd is a purchaser for a valuable consideration paid, without notice of the rights of the plaintiffs below. He gave no evidence whatever of the payment of the purchase money, except the receipt on the deed from Thomas Farrel of the first of July, 1854. That receipt is undoubtedly evidence of payment against Thomas Farrel himself, and all who subsequently derive title from him. It is also evidence to pass the right of Thomas Farrel, whatever it was, at the time. But it is no evidence whatever of the fact of payment against a stranger, or even against one who derived title from Thomas Farrel previously to the date of the conveyance to Lloyd. Against them it is nothing but hearsay. It is a mere *ex parte* declaration not under oath, taken without any opportunity to cross-examine. It has been long settled that such declarations are not evidence against strangers. It is upon this principle that an indorsement by the payee of negotiable paper, although sufficient evidence to pass his right and to enable the holder to maintain an action in his own name, is entirely insufficient to show that he paid a valuable consideration for it, so as to exclude a defense which would be otherwise available: *Holme v. Karsper*, 5 Binn. 471; *Beltzhoover v. Blackstock*, 8 Watts, 20 [27 Am. Dec. 330]. It is upon this principle that the receipt in a deed is not evidence of payment of the purchase money against creditors who attack it by evidence tending to show that it was made to defraud them: *Clark v. Depew*, 25 Pa. St. 515. It is upon this principle that it has been constantly held that the declarations of a grantor, after he has parted with his interest, are not evidence against his grantee: *Packer v. Gonsales*, 1 Serg. & R. 526; *Patton v. Goldsborough*, 9 Id. 47; *Babb v. Clemson*, 12 Id. 328; *Hoffman v. Lee*, 3 Watts, 352; *McCulloch v. Cowher*, 5 Watts & S. 427; *Gregory v. Griffin*, 1 Pa. St. 208. It is on this principle that it has been repeatedly held that receipts of third persons are not evidence of payment of money, unless those persons are either officers of the law or agents of the party against whom they are offered: *Cutbush v. Gilhert*, 4 Serg. & R. 555; *Morton v. Morton*, 13 Id. 108. On the same principle, it has been a hundred times decided that recitals in deeds are not

evidence of the facts recited against strangers or persons who derive title from the grantors before the execution of the deeds containing such recitals: *Penrose v. Griffith*, 4 Binn. 231; *Garwood v. Dennis*, Id. 327; *Dean v. Connelly*, 6 Pa. St. 239; *Poyntell v. Spencer*, Id. 254; *Siltsell v. Michael*, 3 Watts & S. 332. It is on this principle that the rule in chancery practice requires that the plea of "purchaser for a valuable consideration" should distinctly aver that the consideration money was *bona fide* and truly paid, independently of the recital in the purchase deed: 2 Daniell's Ch. Pr. 201. Although the courts in this country may not adopt all the rules of practice in the English chancery, they are governed by the same equity principles, and enforce them in some form. Chancellor Desaussure, in speaking of this plea, has very properly held that its substance must be regarded in administering equity; and that it must be averred that the purchase money was "*bona fide*, truly, and actually paid:" *Snelgrove v. Snelgrove*, 4 Desau. Eq. 286. No new principle was announced when it was held that the receipt in the deed of purchase is not evidence to support this material averment against any persons except parties to the deed, or persons who subsequently derive title from the grantor. This application of a very familiar rule of evidence was fully sanctioned in *Union Canal Company v. Young*, 1 Whart. 432 [30 Am. Dec. 212]; *Rogers v. Hall*, 4 Watts, 362; *Bolton v. Johns*, 5 Pa. St. 151 [47 Am. Dec. 404]; and *Henry v. Raiman*, 25 Id. 360. A receipt for the purchase money at the foot of the deed has been held to be "evidence of the lowest order," even against the party signing it, because it was "every day's practice to have such a receipt" on the deed, "when perhaps nine times in ten there was not a shilling paid:" *Hamilton v. McGuire*, 3 Serg. & R. 356. If such evidence were received against strangers for the purpose of extinguishing their equitable rights, the salutary rules established for ages would be subverted; hearsay evidence would be substituted for testimony under the sanction of an oath, and all the advantages of a cross-examination would be swept away. Under such a system, no equitable title could be protected. But it is urged that there is a presumption that the grantor and grantee have acted with integrity. This may be so; but that is no reason why their declarations should be given in evidence against persons who have no connection with them. If they are acquainted with material facts, they are as much bound to deliver their testimony under oath as other persons, if competent

witnesses. If interested, neither their declarations nor their testimony can be received in their own favor.

But the rejection of a receipt signed by a stranger implies no imputation of dishonesty in the party signing it. It is always signed whenever a conveyance is made, and proves nothing further, even against the grantor, than that he has either received the purchase money or has taken security for it. Taking security for it is no payment which would defeat a prior title. *Bona fide* payment is an affirmative fact peculiarly within the knowledge of the party making such payment or claiming advantage from it. It is therefore easy for him to prove it. While, on the other hand, the opposite party, who is a stranger to the transaction, might have insuperable difficulties in proving a negative. It is against all the reason and life of the law that such a burden should be imposed upon him.

It follows from this view of the case that Gilbert L. Lloyd stands in no better condition than Thomas Farrel, and that the court was correct in giving a positive direction in favor of the plaintiffs below. This disposes of the whole case.

Judgment affirmed.

PURCHASE BY OR CONVEYANCE TO ONE OF SEVERAL CO-TENANTS OF OUTSTANDING TITLE inures to benefit of all the tenants in common: *Weaver v. Wible*, 64 Am. Dec. 696, and note 698; *Tisdale v. Tisdale*, Id. 775, and note 784; *Mandeville v. Solomon*, 39 Cal. 133; *Noel v. White*, 37 Pa. St. 525; the two last citing the principal case; and the rule will apply to a purchase by the tenant at tax sale: *Bender v. Stewart*, 75 Ind. 91.

TRUST IS NOT CREATED BY MERE DECLARATION OF VENDEE at the sale that he purchased for another without further proof: *Willard v. Willard*, 56 Pa. St. 125, citing the principal case. The principal case is also cited on this point in *Farrell v. Lloyd*, 69 Id. 246, which was a case arising out of the same subject-matter.

RECITAL IN DEED OF PAYMENT OF PURCHASE MONEY, EFFECT OF: See *Hammond v. Woodman*, 66 Am. Dec. 219; *Wood v. Chapin*, 67 Id. 62, and cases in note 74, 75; the recital is conclusive as against the grantor and any claiming under him, but not against strangers: *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. St. 18, citing the principal case.

PARTY CLAIMING AS BONA FIDE PURCHASER WITHOUT NOTICE, and for a valuable consideration, must affirmatively prove the payment of the consideration by other evidence than the receipt upon the deed: *Whelan v. McCreary*, 64 Ala. 328; *Moresi v. Swift*, 15 Nev. 224; *Redfield & R. M. Co. v. Dysart*, 62 Pa. St. 66, all citing the principal case.

HALDEMAN & GRUBB v. BANK OF MIDDLETOWN.

[28 PENNSYLVANIA STATE, 440.]

THE FACT THAT DRAFT DRAWN BY FIRM IS PAYABLE TO ORDER OF ONE PARTNER, and by him indorsed, is not evidence that it was not drawn by the firm in the usual course of business.

PRESUMPTION IS THAT DRAWING OF DRAFT OR BILL in name of firm by one partner, and offering the same for discount, is a partnership transaction, even though the draft or bill was made payable to the order of one of the members of the firm.

PRESUMPTION THAT DRAWING OF DRAFT IN FIRM NAME and discounting it was a partnership transaction is not affected because the paper was discounted at the request of the partner who drew it in the name of the firm, and whose name was inserted as payee, and who indorsed it and drew the proceeds.

ACTUAL KNOWLEDGE THAT NEGOTIABLE PAPER WAS GIVEN WITHOUT CONSENT of certain partners is a good defense to the non-consenting partners.

NOTE OF FIRM GIVEN FOR PRIVATE DEBT OF ONE PARTNER IS GOOD against the firm in the hands of a *bona fide* holder; the right of the individual partner's creditor depending, however, on the consent of all the partners.

IN ACTION AGAINST FIRM ON NEGOTIABLE PAPER DRAWN AND DISCOUNTED BY PARTNER IN NAME OF FIRM it is not error to reject evidence showing that the partner having the paper discounted appropriated the proceeds to his own use.

IN ACTION AGAINST PARTNERSHIP, EVIDENCE HAVING NO TENDENCY TO DISPROVE EXISTENCE OF PARTNERSHIP, as that the partners held the real estate used in their partnership transactions as tenants in common, or that the counsel of one of the partners advised him not to enter into the partnership, or that the partner having the paper discounted did not pay over to the other partner his proportion of the profits of the concern, is not admissible for that purpose.

DEBT against partners on a bill of exchange. The facts are stated in the opinion.

Kline, for the plaintiff in error.

Parke and Hazelhurst, for the defendant in error.

By Court, KNOX, J. Peter Haldeman and Edward B. Grubb were partners in manufacturing iron at the Henry Clay furnace in Lancaster county, from June, 1853, to November, 1854. On the twenty-first of October, 1854, Peter Haldeman, in his own name and that of his partner, E. B. Grubb, made a draft for six thousand dollars at sixty days, directed to Haldeman Brothers, Philadelphia, payable to the order of Peter Haldeman, and by him indorsed. The draft was discounted by the Bank of Middletown, and the proceeds paid to Peter Haldeman. It was protested for non-payment, and this suit was brought by the bank

against Haldeman & Grubb to recover the amount due and unpaid upon the draft.

Edward B. Grubb defends, upon the ground that the draft, although in the name of Peter Haldeman and himself, was really made by Haldeman for his own use, and that the proceeds were not used in the business of Haldeman & Grubb, but were appropriated by Haldeman to his individual purposes. The case depends upon the question whether the bank was bound to inquire as to the authority of Haldeman to draw the draft in the firm names. It is not pretended that the bank had actual notice that the discount was for Haldeman's separate use; but it is alleged that the form of the draft was sufficient to put the bank upon inquiry. The draft was made payable to Peter Haldeman's order. Was this an indication that it was not drawn by the firm in the usual course of its business? Certainly it was not; for although it may not be the ordinary form in which bills are drawn, it is by no means an unusual transaction, when the object of drawing a draft is to raise money for a firm that it should be made payable to the order, and indorsed by one of the members of the firm. The law merchant, founded as it is upon the usage and custom of merchants, should conform to the business habits of the people where it is to be applied, rather than compel the business community to follow arbitrary rules not in conformity with the common understanding of business men. Where a draft or bill, drawn in the name of a firm by one of the partners, is offered for discount, the presumption is that drawing the draft was a partnership transaction, even although it was made payable to the order of one of the members of the firm. Actual knowledge that a bill or note, purporting to be drawn or made by a firm, was given without the consent of some of the partners, is a good defense as to the non-consenting partners; but the presumption that the paper is what it purports to be cannot be overthrown upon a mere matter of form in inserting the name of one of the members of a partnership as payee. Where a firm note is given for an individual debt, the person to whom the debt was due is affected with notice that the note was not given in a partnership transaction, and therefore his right to recover from the firm will depend upon the assent of the partner or partners, other than the original debtor. But such a note would clearly be good against the firm in the hands of a *bona fide* holder.

It is unnecessary to review the authorities cited by the plaintiffs in error. It is sufficient to say that none of them sustain

the position that the form of the draft was notice to the bank that it was not drawn for partnership purposes. The free circulation of mercantile paper is essentially necessary to the prosperity of the business public, and all defense made against it which is not clearly founded upon principles of substantial justice should be disregarded. If the paper is fraudulently put into circulation, let him who has actual knowledge of the fraud, or who has been grossly negligent in obtaining such knowledge, be affected by the fraud; but if notice is to be implied from the name of the payee in the bill or note, other implications of equal or greater weight will be made from other causes; and the end would be that no one would dare take a note or bill without first taking the advice of counsel learned in the law merchant. In the case at bar, when the draft was offered to the bank for discount, it was accompanied by a letter from Peter Haldeman, in which he expressly stated that the money was wanted for the Henry Clay furnace, in which he and Grubb were jointly interested. Instead of having notice that this was not a partnership transaction, in addition to the presumption arising from the names of the drawers, the bank was expressly told that the money was wanted to pay partnership debts. We do not think that the letter referred to was necessary to the plaintiff's case, but it certainly did not weaken it. That the draft was discounted upon the request of Haldeman, and the proceeds paid to him, is entirely immaterial, for which we have the authority of Lord Eldon in *Ex parte Bonbonus*, 8 Ves. 542, and Chief Justice Gibson in *Tanner v. Hall*, 1 Pa. St. 417. It is difficult to distinguish this case in principle from that of *Ihmsen v. Negley*, 25 Id. 297. There the note in suit was made by Negley & Mohan, in the handwriting of James S. Negley, payable to the order of James S. Negley, and indorsed by James S. Negley, and by Negley, Mohan, & Co.; which indorsements were in the handwriting of James S. Negley, who was a member of the firm of Negley & Mohan as well as that of Negley, Mohan, & Co. The suit was against Negley, Mohan, & Co., and it was the unanimous opinion of this court that there was nothing suspicious upon the face of the note, and that a *bona fide* holder was entitled to recover against Negley, Mohan, & Co. It is to be observed that the note of Negley & Mohan was made payable to the order of James S. Negley, and by him indorsed; now if this was sufficient to have put the purchasers upon inquiry in favor of Negley & Mohan, it would surely have had the same effect in behalf of Negley, Mohan, & Co., for James S. Negley had the

same authority to sign the names of the one firm as makers as he had to indorse the note in the name of the other firm. Had the suit been against the firm of Negley & Mohan, that case and the one in hand would have been identical in fact as they now are in principle.

From what has been said, it follows that there was no error in rejecting evidence that Haldeman had appropriated the money to his own use, and that the statements made in his letter to the cashier of the bank were not true. It likewise follows that the instructions given by the court of common pleas to the jury were correct. Neither was there error committed in rejecting the offer to prove by Mr. Penrose that the purchase of the real estate was made by Haldeman & Grubb as tenants in common, and not as partners; and that he advised Grubb not to enter into a partnership with Haldeman, and that Haldeman did not pay over to Grubb the one half of the profits. This offered evidence did not tend to disprove the partnership, and was therefore properly rejected.

Judgment affirmed.

PARTNER'S POWER TO BIND FIRM BY NEGOTIABLE INSTRUMENT drawn by him in firm name: See *Crosier v. Kirker*, 51 Am. Dec. 724; *Hamilton v. Summers*, 54 Id. 509. Contracts made in the firm name will be presumed to be for the firm: *Hogg v. Orgill*, 34 Pa. St. 349, citing the principal case.

BARTO v. SCHMECK.

[28 PENNSYLVANIA STATE, 457.]

INDORSER OF NOTE BEFORE NEGOTIATION THEREOF BY PAYEE is liable to the payee if it can be proved that the object of the indorsement was to give the maker of the note credit with the payee; and on proof of such fact, the indorser would be liable in a similar manner to the indorsee of the payee, and either may write over such indorser's signature, an agreement corresponding with such facts.

IN ABSENCE OF EXTRINSIC PROOF TO CHARGE IRREGULAR INDORSER, his liability is measured by his indorsement solely, and he is not liable to the payee at all, and only liable to subsequent indorsees by the payee assuming the position of first indorser, and negotiating the note on the credit of all the parties to it.

Action on promissory note. The facts are stated in the opinion.

McKenty, for the plaintiff in error.

Banks and Van Reed, for the defendant in error.

By Court, WOODWARD, J. The plaintiff sues as indorsee of a note negotiable on its face; but the defendant whom he sues, not an original party to the note, appears to have indorsed it before the payee indorsed it to the plaintiff. Such an indorsement is out of the usual course of business, and makes the paper what was called in *Leech v. Hill*, 4 Watts, 449, "an anomalous instrument."

Undoubtedly the indorser meant to pledge his responsibility for the payment of the note—but how?

If he meant to be bound to the payee, as surety or guarantor for the maker, the plaintiff was bound to prove the agreement, or circumstances from which it might be fairly inferred. And to prove it by extrinsic evidence—not by the indorsement merely, because that, being out of the usual course, cannot import either a guaranty or suretyship.

And when a party has evidence to define and explain such an indorsement, he may recover upon it as on any other cause of action which rests in parol.

But in this case there was no evidence explanatory of the indorsement. The question therefore is, What does it, of itself, and unaided by extrinsic proof, import? Simply that the defendant meant to stand as second indorser after the payee. This is the doctrine of the cases as examined and declared in *Taylor v. McCune*, 11 Pa. St. 466, and as repeated lately in this court in the cases of *Schollenberger v. Nehf*, 28 Id. 189, and *Fegenbush v. Lang*, Id. 193. In *Kyner v. Shower*, 13 Id. 444, Chief Justice Gibson referred himself with approbation to *Taylor v. McCune*, *supra*; but in stating the substance of that case, not then reported, he erroneously imputed to it the doctrine that where there is no evidence to explain this anomalous kind of indorsement, the indorser "authorizes the payee to write over his name any form of engagement he may see proper."

It was this observation that manifestly misled the learned judge below into deciding that, there being no evidence to explain Barto's indorsement, he was bound to meet any form of engagement the payee might see fit to write over his name.

An examination of *Taylor v. McCune*, *supra*, will show that no such proposition was affirmed, but that the ruling was to exactly the contrary effect, though the syllabus of the case proves that the reporter misapprehended it, not, indeed, in the same manner as Judge Gibson, but quite as essentially.

It was a suit by McCune against Taylor on an indorsement

made by the latter of a promissory note of Alexander Short to McCune, at six months. On the trial, evidence was given to explain the purposes of the indorsement, and the judge of the district court of Alleghany instructed the jury that if they believed the informal note was given by Short and Taylor to secure the plaintiff for the amount due to him, the note was to be construed according to the understanding of the parties. The jury did so believe, and the plaintiff had the verdict and judgment. When it came into this court, Judge Bell reviewed the cases on the subject of these informal indorsements, and declared that in all of them the event was made to depend on the express undertaking of the defendant as surety, "manifested, not merely by his irregular indorsement of the note, but by evidence *aliunde*;" and then he proceeded to show that the extrinsic proof in the case failed to establish Taylor's liability; that the legal presumption, from the mere indorsement, was, that Taylor intended to stand as second indorser, and concluded by reversing the judgment in these words: "There was no *scintilla* of proof of an understanding of the parties, differing from that to be drawn from the instrument itself, and consequently the plaintiff was not entitled to recover."

Such is *Taylor v. McCune, supra*; and the two propositions it establishes, and which have been enforced in the recent cases already referred to, may be stated thus:

1. That where a third party indorses a negotiable note before the payee has negotiated it, he is liable to the payee if it can be proved that the object of the indorsement was to give to the maker of the note credit with the payee. And it is a fair inference from this proposition that on proof of such an understanding the indorser would be in like manner liable to any indorsee of the payee, either of whom may write over the signature of the indorser an agreement corresponding with the facts susceptible of proof.

2. But where there is no extrinsic or collateral proof to charge such an irregular indorser—where his liability is to be measured solely by the fact of indorsement, he is not responsible to the payee at all, and becomes responsible to a subsequent indorsee only by the payee's assuming the position of a first indorser, and then negotiating the note on the credit of all the parties to it.

The cases of *Leech v. Hill*, 4 Watts, 449, *Kyner v. Shower*, 13 Pa. St. 444, and *Schollenberger v. Nehf*, 28 Id. 189, illustrate the first of these propositions, and *Taylor v. McCune*, 11 Id. 466,

and *Fegenbush v. Lang*, 28 Id. 193, are illustrations of the second. There is no difficulty in classifying the case before us. It belongs to the second proposition.

There was no proof to charge Barto with liability to the payee, and he could be made liable to Schmeck as a subsequent holder only by the payee's assuming the responsibility of a first indorser. Barto must be presumed to have come upon the note as second indorser, with the expectation and understanding that Mannerback should be first indorser before it should be negotiated.

It was a fraud on Barto, therefore, for Mannerback to indorse below him, and to negotiate the note to Schmeck, without himself assuming the responsibility of a first indorser. And Schmeck took the note with his eyes wide open to the fact that Mannerback was the payee, and could not regularly be second indorser. This was a circumstance sufficient to discredit the commercial character of the paper, and to put Schmeck upon inquiry for the collateral agreement which could alone entitle him to charge Barto as first indorser. The defense, therefore, is just as available against Schmeck as it would have been against Mannerback.

Barto is liable to neither—not to Mannerback, because his mere indorsement imported in law no liability to him; nor to Schmeck, because in taking the note without Mannerback on it as first indorser, he deprived Barto of that recourse to Mannerback which he was entitled to have, and without which, it is fair to presume, he would not have indorsed the paper.

The judgment is reversed, and a *venire de novo* awarded.

PERSON WRITING NAME ON BACK OF NOTE BEFORE DELIVERY TO PAYEE, OR BEFORE NEGOTIATION BY HIM, extent of liability of: See *Lewis v. Harvey*, 59 Am. Dec. 286, and note 292, citing prior cases; *Cook v. Southwick*, 60 Id. 181; *Wright v. Morse*, 60 Id. 291. The principal case is cited to the proposition that such indorser is liable to the payee on proof that the object of his indorsement was to give the maker credit, but that in absence of such proof he is liable merely as an indorser after the payee, in *Smith v. Kessler*, 44 Pa. St. 144; *Slack v. Kirk*, 67 Id. 384; *Schafer v. Farmers' and Mechanics' Bank*, 59 Id. 149; S. C., 8 Am. L. Reg., N. S., 689; *Shenk v. Robeson*, 2 Grant Cas. 375; *Martin v. Duffey*, 4 Phila. 75; *Haines v. Atwood*, 7 Id. 197.

COOVER'S APPEAL.

[29 PENNSYLVANIA STATE, 9.]

SALE BY PARTNER OF HIS INTEREST IN PERSONAL PROPERTY OF FIRM passes nothing but his interest in the surplus, after payment of the partnership debts.

PARTNERSHIP CREDITORS WHO HAVE NO LIEN ON PERSONAL PROPERTY OF FIRM have no means of enforcing their claim to a preference in the distribution of it; their equity is only to be worked out through the equities of the partners themselves, each of whom has a right, while he exercises dominion over the property, to insist on its application to partnership claims before it be appropriated to the individual debts of the several partners. This right may, however, be waived by each partner disposing of all his interest in the property.

LIEN ACQUIRED BY PARTNERSHIP CREDITORS ON JOINT ASSETS CANNOT BE DEFEATED by any subsequent disposition of the property by the several partners.

WHERE EXECUTIONS ARE ISSUED AGAINST INDIVIDUAL PARTNERS FOR SEPARATE DEBTS, AND ALSO AGAINST FIRM for partnership debts, and by agreement of the execution creditors the firm property is all sold at the same time, the firm creditors are entitled to preference, and are entitled to all the proceeds where necessary to satisfy their claims, and the rule is the same though the individual executions were prior in date.

APPEAL from order confirming auditor's report. Certain judgments having been rendered against a partnership, and other judgments rendered against members constituting the firm, and executions having been issued on each judgment, all the execution creditors agreed, for mutual convenience, that all the firm property should be sold under all the executions at one sale. The property was sold, and under the agreement the proceeds were paid into court, and an auditor appointed to make distribution. The auditor reported a certain mode of distribution, which in effect was that the claims of the firm creditors be first settled in full, and if any balance remain, that it be distributed to the individual creditors, in the order of issuance of their executions. The report was confirmed, and the distribution so decreed. From this decree the individual creditors appealed. The remaining facts appear in the opinion.

By Court, LEWIS, C. J. If one of several partners sell his interest in the personal property belonging to the firm, nothing passes but his interest in the surplus, after payment of the partnership debts. Partnership creditors who have no lien on the personal estate of the firm have no means of enforcing their claim to a preference in the distribution of it. Their equity, whatever it may be, is to be worked out through the equities of the partners themselves, each of whom has a right, while he

exercises dominion over the property, to insist on its application to partnership claims, before it be appropriated to the individual debts of the several partners. But this right may be waived, and it is waived when each partner disposes of all his interest in the property. Sales on separate executions against the several partners have the same effect as sales by the individual partners themselves: *Doner v. Stouffer*, 1 Penr. & W. 205 [21 Am. Dec. 370]; *Baker's Appeal*, 21 Pa. St. 76 [59 Am. Dec. 752]. But when the joint creditors acquire a lien on the joint assets, either by assignment or by levy, no subsequent disposition of the property by the several partners, or by their separate execution creditors, can defeat such lien. It differs from a lien against a single member of the firm in this important particular, that the former is a lien on the chattels themselves, while the latter is a lien on the surplus only, after payment of partnership debts. The lien of the partnership creditors is in time if acquired before the sale. The moment the equity of the partnership creditors is thus secured, their rights become paramount, and no arrangement of the order of sale can give the separate creditors a preference over them. It follows that the agreement respecting the time and manner of selling on the executions in the sheriff's hands did not change the rights of the parties. The partnership creditors were entitled to the proceeds. As the sum raised was not sufficient to pay them, there was, of course, nothing left for the separate creditors. The opinion of the learned president of the common pleas contains a correct statement of the law of this case.

Decree of distribution affirmed at the costs of the appellants.

LEWIS, C. J. The decree of distribution affirmed in *Coover's Appeal*, for the reasons assigned in the opinion just delivered, disposes of *Rex, Silvis, & Co.'s Appeal*, *Henry L. King's Appeal*, and *Mary Dare's Appeal*.

Decree of distribution affirmed at the costs of the appellants.

PARTNERSHIP CREDITORS AND CREDITORS OF INDIVIDUAL PARTNERS, liens or priorities of, regarding firm property: See *Miller v. Estill*, 67 Am. Dec. 305, and *Tillinghast v. Champlin*, Id. 510, and notes to both cases, citing many prior decisions in the series, which cover the subject-matter of the principal case. The equities of the firm creditors are to be worked out through the equities of the partners: *McNutt v. Strayhorn*, 39 Pa. St. 273, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Backus v. Murphy*, 39 Pa. St. 401, and *Stuart v. McHenry*, 3 Phila. 342, as to the effect of a judicial sale of partnership effects at the suit of joint and several creditors.

WEAVER v. FEGELY.

[20 PENNSYLVANIA STATE, 27.]

TWO THOUSAND POUNDS AVOIRDUPOIS WEIGHT CONSTITUTE TON in Pennsylvania: *Evans v. Meyers*, 25 Pa. St. 114.

GRANT IN FEDERAL CONSTITUTION OF POWER TO CONGRESS TO REGULATE WEIGHTS AND MEASURES does not extinguish the right of the states to deal with the same subject until congress shall have exercised its power in regard thereto.

GRANT OF POWER TO CONGRESS EXCLUDES RIGHT OF STATE over same subject only when the grant is in express terms an exclusive authority to the Union, or where the grant to congress is coupled with a prohibition to the states to exercise the same power, or where the grant to the one would be repugnant to the exercise of a similar authority by the other.

ASSUMPSIT to recover the price of certain coal. The sole question in dispute was whether a ton consisted of two thousand or two thousand two hundred and forty pounds avoirdupois.

Banks, for the plaintiff in error.

Filbert, for the defendant in error.

By Court, LEWIS, C. J. The question raised in this case was decided in *Evans v. Myers*, 25 Pa. St. 114. It was not then supposed by any one that congress had exercised their constitutional power to fix a standard of weights and measures. In the decision since pronounced by Judge Grier, in *Holt v. Steamer Miantonomi*, 3 Liv. Law Mag. 598, S. C., *sub nom. The Miantonomi*, 3 Wall. jun. 46, it is fully conceded that they have not hitherto exercised that power. The same concession is made by Judge Story in his Commentaries on the Constitution. The omission to exercise this power was in fact made a matter of complaint and remonstrance by the legislature of Pennsylvania, in their resolutions of the ninth of April, 1834, in which the general government was urged to perform this obligation. The act of assembly of the fifteenth of April, 1834, is based upon the neglect of the federal legislature in this particular, and it is in that act expressly provided that whenever congress shall establish a standard of weights and measures, the standards named in the state law shall be made to conform to the act of congress. It is an error to suppose that either the resolution of congress of the fourteenth of June, 1836, or the acts of the nineteenth of May, 1828, and thirtieth of August, 1842, establish a standard of weights and measures to regulate the business transactions of the people. The resolution of 1836 was nothing more than a preliminary step looking to the exercise of the power at a future

day. The act of 1828 had relation merely to the operations of the United States mint; and the act of 1842 was limited exclusively to the collection of the public revenue, under the tariff of that year. There is therefore no foundation whatever for the allegation that congress has exercised this power, and that there is therefore any actual conflict between the state and national legislation on this subject.

But it seems to be thought by the plaintiff in error that the mere grant of the power to congress, although not exercised by that body, extinguishes it in the states. This is contrary to the rule of construction adopted by all approved authorities. Alexander Hamilton, who was not likely to relinquish federal authority where he could maintain it with any show of reason, states the rule thus: "This exclusive delegation, or rather this alienation, of state sovereignty exists only in three cases: 1. Where the constitution in express terms granted an exclusive authority to the Union; 2. Where it granted an authority to the Union, and at the same time prohibited the states from exercising the like authority; 3. Where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant." It is not pretended that the grant of the power to regulate weights and measures is exclusive in express terms, nor that the states are expressly prohibited from exercising it. The state sovereignties are therefore to be extinguished as regards this subject, if at all, by mere implication. But that implication can only arise where the state authority is "absolutely and totally contradictory and repugnant" to the power delegated to congress. These terms necessarily imply the pre-existence of something to contradict or oppose. But there is nothing whatever, either in the constitution or in the acts of congress, which the act of assembly in any respect contravenes or opposes. It is therefore perfectly constitutional. The true rule in this respect was correctly stated by Chief Justice Tilghman, in the celebrated case of *Moore v. Houston*, 3 Serg. & R. 179. "Where the authority of the states is taken away by implication, they may continue to act until the United States exercise their power, because until such exercise there can be no incompatibility." The decision of the supreme court of Pennsylvania in the case referred to was affirmed in the supreme court of the United States. The frequent application of the principle settled in that case is familiar to all persons conversant with the operations of our government. Congress has power to provide for calling forth the militia, but the

states may do the same, so that their enactments do not conflict with the acts of congress: *Moore v. Houston, supra; Houston v. Moore*, 5 Wheat. 1. Congress may establish uniform bankrupt laws, but the states may exercise the same power within their respective jurisdictions, so long as they do not conflict with existing regulations of congress: *Sturges v. Crowninshield*, 4 Id. 122; *Ogden v. Saunders*, 12 Id. 213; *Boyle v. Zacharie*, 6 Pet. 348. Congress may exercise the taxing power, and so may the states exercise general powers of the like kind. Congress have power to punish for counterfeiting the coin, and had power to punish for counterfeiting the notes of the Bank of the United States, and the states exercised the same power: *Fox v. Ohio*, 5 How. 432; *White v. Commonwealth*, 4 Binn. 418; *Livingston v. Van Ingen*, 9 Johns. 267. Congress may grant exclusive privileges for limited times to authors and inventors. The states did the same until congress exercised the power: *Livingston v. Van Ingen, supra*. Congress have power to provide for the recaption of fugitive slaves. The states have the same power so long as their enactments are not in conflict with the acts of congress on the subject. It is true that this principle was denied by Justice Story in *Prigg v. Pennsylvania*, 16 Pet. 539. But that opinion was on a question which did not arise in the case. It was one of the most mischievous heresies ever promulgated. It was never received as the true construction of the federal constitution, and the more recent case of *Moore v. Illinois*, 14 How. 13, shows that it was promulgated without the sanction of a majority of the court.

The United States courts have jurisdiction over controversies between citizens of different states, but no one has ever doubted the jurisdiction of the state courts over the same parties. To hold that the mere grant of power to the federal government over any subject extinguishes state authority over the same subject would invalidate thousands of judgments rendered by state courts, in controversies between citizens of different states. In every state in the Union weights and measures have been constantly governed either by a standard established by a state statute, or by the common law of the state. The power of each state to establish its own common law on this subject has never been denied. If the states have this power, they certainly have the power to enact statutes. The power being acknowledged, it is not for the federal government to interfere with the manner of exercising it. To deny the existence of this authority now would overturn the practice which has been uniformly acted on by all the states during the whole period of their political exist-

ence. It would throw all past transactions into confusion, and leave the business community no guide whatever for the future; for there is no certainty that congress will ever deem it expedient to fix a standard. Chief Justice Tilghman, in *Farmers' and Mechanics' Bank v. Smith*, 3 Serg. & R. 69, stated a fact which no one has ever denied, when he declared that "the states have regulated weights and measures at their pleasure, . . . without objection." Their right to do so, until congress shall act on the subject, admits of no doubt.

Judgment affirmed.

WEIGHTS AND MEASURES, POWER TO REGULATE.—The United States constitution, art. 1, sec. 8, provides that "the congress shall have power to . . . fix the standard of weights and measures." This power on the part of congress has never been exercised. It is said that when the power is exercised by congress it will be exclusive of an exercise of the same power by the states. In *Holt v. Steamer Miantonomi*, 3 Liv. Law Mag. 598, S. C., 3 Wall. jun. 46, Judge Grier, while admitting that congress had not exercised the power, and that the states did so continually, questioned the validity of any state statute on the subject. It was not necessary, however, to decide that question in the case, the parties having fixed the weight by contract. It is, however, the opinion of the learned commentators, Story and Pomeroy, that until congress shall fix a standard, the states possess the power to fix their own weights and measures: 2 Story on Const., sec. 1122; Pomeroy Const. Law, sec. 410; and such opinion is apparently correct on theory, for the states may exercise powers granted to congress, where congress fails to exercise them, except when the grant to the Union is in express terms exclusive, or coupled with a prohibition to the states, or where the grant to one would make the exercise by the other absolutely and totally repugnant: *Thames Bank v. Lovell*, 46 Am. Dec. 332; *Craig v. Kline*, 65 Pa. St. 409; *Coffman v. Keithly*, 24 Ind. 513, citing the principal case. Story says that this rule has been uniformly upheld, and its correctness never controverted: Story on Const., sec. 436; *Houston v. Moore*, 5 Wheat. 1; *Ogden v. Gibbons*, 9 Id. 1; *Sturges v. Crowninshield*, 4 Id. 122; *Ogden v. Saunders*, 12 Id. 1.

BITTINGER v. BAKER.

[29 PENNSYLVANIA STATE, 66.]

TENANT UNDER LEASE OF LATER DATE THAN JUDGMENT OR OTHER LIEN, after a sheriff's sale under such lien, becomes a tenant at will of the sheriff's vendee, and if such tenant has sown his crop before he was notified of the purchaser's intention to determine the tenancy, he will be entitled to take it away.

PERSON IN POSSESSION OF LAND UNDER TITLE WHICH MAY BE DETERMINED by happening of uncertain event, not within his control, is on such determination of his lease entitled to the way-going crop.

LESSEE IN POSSESSION AT TIME OF SHERIFF'S SALE OF PREMISES is to be treated either as a tenant for years or at will: if for years, he is entitled

to the way-going crop, under the general custom or common law of Pennsylvania; if at will, he has the right to the larger emblements or way-going crop that belongs by the common law to that species of tenancy.

CASES ON WAY-GOING CROPS REVIEWED.

TROVER for conversion of certain growing crops. The grain was sown by the lessee of certain land, which land was incumbered with a judgment at the time of the lease. Under such judgment the land was sold to defendant. Plaintiff in the mean time recovered a judgment against such lessee, and thereunder levied on the crop which had been harvested. Defendant, however, claimed that the title to the crop passed to him, together with the land, and therefore sued for its value. Verdict for plaintiff. Defendant excepted, and took this writ of error.

Buehler and Hepburn, for the plaintiff in error.

McConaughy and Cooper, for the defendant in error.

By Court, LOWRIE, J. There are several erroneous cases in our books, of reports on the subject of the way-going crop, which, if they are not known as such, are continually tending to mislead the bar and the bench. In *Stambaugh v. Yeates*, 2 Rawle, 161, it was decided that if during the currency of executions which resulted in the sale of land the crop on it was sold by a constable, his vendee's title is good against the sheriff's vendee of the land with the crop still on it. In *Myers v. White*, 1 Id. 353, it was decided that even after the commencement of suit on a mortgage, the mortgagor may dispose of his growing crop, and then it will not pass to the sheriff's vendee, though it be still growing on the land. In *Smith v. Johnston*, 1 Penr. & W. 471 [21 Am. Dec. 404], it was decided that even after a private sale of land the law allows the vendor to enter and carry off the crop previously sown by him.

If these cases were right, then the conclusion would be inevitable, and *a fortiori*, that a tenant of the owner of the land would be entitled to his way-going crop, notwithstanding a sheriff's sale of the land before it was gathered; for he got his title to it prior to the sale, as others did in the first two cases. But we can make no use of them; for they are all erroneous, and have all been corrected by the decisions declaring that all rent in grain or in money falling due after a private sale of the land, or after a judicial sale with the deed acknowledged, and all grain of the vendor or debtor then growing on the land, go to the vendee, and no assignment of them is good against the sheriff's vendee: *McMutrie v. McCormick*. 3 Penr. & W. 496; *Farmers' and Me-*

chanics' Bank v. Ege, 9 Watts, 436 [36 Am. Dec. 130]; *Wilkins v. Vashbinder*, 7 Id. 378; *Bank of Pennsylvania v. Wise*, 3 Id. 394; *Menough's Appeal*, 5 Watts & S. 432; *Boyd v. McCombs*, 4 Pa. St. 146; *Bear v. Bitzer*, 16 Id. 175 [55 Am. Dec. 490]; and these corrections are fully sustained by decisions elsewhere: *Pitts v. Hendrix*, 6 Ga. 452; *Gillett v. Balcom*, 6 Barb. 370; *Jones v. Thomas*, 8 Blackf. 428; *Shepard v. Philbrick*, 2 Denio, 174; *Crews v. Pendleton*, 1 Leigh, 297 [19 Am. Dec. 750]; *Price v. Morgan*, 2 Mee. & W. 54; *Anonymous*, 2 Leon. 54.

The case of *Fullerton v. Shauffer*, 12 Pa. St. 220, if we understand the report of it, decides that a rent payable by a share of the corn, etc., and agreed in the lease to be applied to a debt due by the lessor to the lessee, is a rent paid as of the day of the lease, and that on a subsequent sheriff's sale of the land the lessor's share of the growing crop did not pass to the sheriff's vendee, so as to entitle him to claim it under the lease as a rent accruing after his purchase. It is difficult to reconcile this with other decisions: *Boyd v. McCombs*, 4 Pa. St. 146; *Menough's Appeal*, 5 Watts & S. 432; and with the act of assembly, which declares that rent paid in advance shall not be good against the sheriff's vendee under a prior lien, and with the fact that a rent of a share of the crop cannot be in fact paid before the crop is gathered and its amount ascertained. If it merely means to declare that when the sheriff's vendee affirms the lease by suing on it, he must abide by its terms, then we are not prepared to deny the doctrine. The case, however, is so defectively reported that we cannot regard it as an authority for anything.

In recovering from the errors of the three cases first above referred to, it seems almost natural that there should be an oscillation towards the other extreme; and we come to this extreme in the cases of *Sallade v. James*, 6 Pa. St. 144, and *Groff v. Levan*, 16 Id. 179, where it is decided that when a lease is subsequent to a mortgage or judgment, a sale upon either will take away the lessee's growing crop. At first, the crop, or share of the crop, of the lessor and debtor was the matter in dispute, and the right of the lessee was conceded: *Menough's Appeal*, *supra*; *Boyd v. McCombs*, *supra*; *Fullerton v. Shauffer*, *supra*; *Wilkins v. Vashbinder*, 7 Watts, 378. It was quite lately that the tenant's rights began to be denied. We think it was right to treat mortgage and judgment liens as entirely equivalent in their effect upon the tenant's rights; for both of them are mere liens upon land by our law, and not titles to it; and the executions to enforce them by sale have the same effect on other in-

terests. In states where a mortgage is treated as a title to land, and not as a lien, it is natural enough that on the foreclosure the tenant loses his crop; for he is considered as without title, and the mortgagee enters by paramount title, and takes all; but even he cannot have an action of trespass for mesne profits: 2 Cru. Dig. 108; Coote on Mortgages, 351; *Lane v. King*, 8 Wend. 584. It is plain enough, however, that this rule pays much more regard to the form than to the substance of the transaction in this respect. In Ohio the tenant's growing crop is safe even against a mortgage: *Cassily v. Rhodes*, 12 Ohio, 88.

If at the time of the acknowledgment of the sheriff's deed there be a lessee in possession of the land, the execution law of 1836, section 119, makes him the tenant of the purchaser on the terms of his lease; and if the lease is of later date than the lien on which the sale is made, the same law, section 105, requires him to give up the possession within three months after the purchaser shall choose to give him notice to do so, and to pay to the purchaser all the rent, or the value of the use of the land, accruing after the acknowledgment of the deed, and all damages for unjust detention: Secs. 111, 119; and these provisions are codified from the old law.

It seems to us very plain that this law makes the lessee, under a lease of later date than the lien, a tenant at will of the purchaser under such lien; and then it follows, on well-settled common-law principles, that if he had a crop in the ground before he was notified of the landlord's election to determine the tenancy, he will have a right to take it away. It is essentially a lease for years, but subject to be determined by an uncertain event depending on the will of others, that is, on the will of lien creditors and the purchaser under their liens. As between the lessor and lessee, it is a lease for years. As between the lessee and the sheriff's vendee, it is a lease at the will of the latter, unless he ratifies it as a lease for a term. If a tenant subject to liens were not entitled to the privileges of a tenant at will, then liens would become a nuisance, preventing the leasing of lands incumbered by them, and requiring leases to be made at ruinous rates, because of the risk that is to be run by the tenant.

The influence of this act of assembly seems to have been overlooked in the case of *Sallade v. James*, 6 Pa. St. 144, and of *Groff v. Levan*, 16 Id. 179, which follows its lead; and the decision in the former case is deduced from the assumption that a lessee can have no greater right than his lessor would have had. But this is a mistake, logical as it may at first seem; for it is a

familiar principle that a lessee may be entitled to his way-going crop, even in cases where his lessor would not be; as where a widow is seised of an estate during widowhood, and marries, she cannot have her growing crop, but her lessee is entitled to his: 1 Bla. Com. 124; *Oland v. Burdwick*, Cro. Eliz. *460; *Goodman and Gore's Case*, Godb. & G. 189. Or if there be a lease by a husband of his wife's land, and then a divorce while the tenant's crop is growing, the wife shall not take it from him: *Gould v. Webster*, 1 Tyler, 409.

The principle of these cases is, that where a person is in possession of land under a title that may be determined by an uncertain event not within his control, it is essential to the interests of agriculture that such a determination of his lease shall not prevent him from reaping what he has sown: Co. Lit. 55; 4 Kent's Com. 73; *Bank of Pennsylvania v. Wise*, 3 Watts, 405. It is a rule demanded by the common sense of the people, and depending on it; and if it does not extend to a case like the one we are considering, then we have revealed to us this strange anomaly of a rule of common law or general custom that is unknown to the people, and that operates as a snare to them when acting on the dictates of common sense.

This principle is further illustrated by numerous cases, as when a husband sows land held by him and his wife during marriage, and they are divorced, he shall have his crop; for though the suit is the act of the parties, the sentence of divorce is the act of the law: *Goodman and Gore's Case*, Godb. & G. 189; *Oland v. Burdwick*, Cro. Eliz. *460; *Mackalley's Case*, 5 Co. 116. And where a daughter enters on land as the heir of her father and sows a crop, she may take it away though her title is defeated by an after-born son before it matures: Co. Lit. 55. And in tenancy by statute merchant, which is a tenancy for years, subject to be defeated by payment of the debt by other means, if it is thus defeated, the tenant shall have his growing crop: Id. And so much is this a favor to him that sows, that when land with a growing crop on it is devised to A for life, with remainder to B, and A dies before the crop is gathered, his executors cannot have it; and if a woman sows her land and marries, and her husband dies before the crop is gathered, the wife, and not his executors, shall have it: *Goodman and Gore's Case*, Godb. & G. 189.

Under our execution law, we do not see how it is possible to treat a lessee in possession, or in partial possession by his growing crop, at the time of a sheriff's sale, otherwise than as a ten-

ant for years or as a tenant at will. If he is tenant for years, he is entitled to the usual way-going crop of fall grain, under the common law or general custom of Pennsylvania, unless his contract be otherwise. If he is tenant at will, he is entitled to the larger emblements or way-going crop that belongs by the common law to that species of tenancy. Either of these views is sufficient to protect him in the present case. But his claim here can only be as tenant for years; for his term had expired before the sheriff's sale of the land, and the only right remaining to him was his way-going crop as tenant for years. He had no right to sow more, and therefore could reap no more. The sale of the landlord's right did not defeat the tenant's right to his crop, which he had lawfully sown on a fair and honest lease.

Judgment reversed and a new trial awarded.

KNOX, J., dissented.

TENANT'S RIGHT TO WAY-GOING CROP: See *Craig v. Dale*, 37 Am. Dec. 477; *Forsythe v. Price*, 34 Id. 465; note to *Governor v. Withers*, 50 Id. 102; *Edson v. Colburn*, 67 Id. 730, and cases in note 733. The principal case is cited as an exposition of the law on this head in *Walton v. Jordan*, 65 N. C. 172.

LESSEE UNDER LEASE OF LATER DATE THAN EXISTING LIEN after sheriff's sale becomes tenant at will of the vendee, and is entitled to the way-going crop: *Heavilon v. Farmers' Bank*, 81 Ind. 253; *Stockton's Estate*, 3 Brewst. 324; *Miller v. Clement*, 40 Pa. St. 489; *Hayden v. Patterson*, 51 Id. 265; *Adams v. McKesson*, 53 Id. 82; *Hershey v. Metagar*, 90 Id. 219, all citing the principal case.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

PROVIDENCE BANK v. WILKINSON.

[4 RHODE ISLAND, 507.]

BILL OF INTERPLEADER IS NOT DEMURRABLE ON GROUND OF WANT OF PRIVITY AMONG PARTIES DEFENDANT, one of whom claims three shares of stock in complainant's bank under an attachment against the person in whose name they stand, the second of whom claims two of the shares under an assignment of all three for the benefit of creditors, and the third of whom claims the remaining share under a sale to him by the assignee.

DEFENDANT TO BILL OF INTERPLEADER CANNOT DEMUR ON GROUND THAT HE IS NO PARTY TO ANY SUIT, and has no interest in any suit pending between the other parties to the bill, when the bill alleges that he threatens suit against the complainant as claimant of part of the property, and a suit for the remainder of the property is pending by one who claims under him against the complainant.

OBJECTION OF ADEQUATE REMEDY AT LAW IS NOT AVAILABLE AGAINST BILL OF INTERPLEADER that states a proper case for interpleading; the forum in which the parties shall litigate under the bill, whether at law or in equity, is a matter of after consideration.

EQUITY TAKES CARE, UPON BILL OF INTERPLEADER, that no right or equitable privilege of trial is lost to any party by its interference; therefore a bill of interpleader is not demurrable on the ground that it produces confusion by the change of the forum from law to equity, and deprives the demurrant of his witnesses by making them parties.

BILL of interpleader by the Providence Bank against Wilkinson, Padelford, and Trescott. Padelford had attached, as the property of one Whipple, three shares of the capital stock of the plaintiff bank standing in Whipple's name. Before the attachment the defendant Trescott had claimed these shares as the assignee of Whipple in a voluntary assignment for the benefit of creditors, and after the attachment demanded leave from

the bank to transfer on its books one of the shares to the defendant Wilkinson, who had purchased it from him. The bank refused to permit this, because of the attachment; and afterwards Wilkinson brought suit against the bank for damages resulting from this refusal, and for the dividends accrued thereon. This suit and the attachment were still pending. The bill alleged these facts, averred that the complainant bank was and always had been ready to transfer the stock, and pay the dividends, to the rightful owner, but that Padelford claimed the shares under his attachment, and Trescott claimed two of them, and Wilkinson one of them; that they have each presented their claims to the bank, and threaten to sue, and Wilkinson threatens to prosecute his suit already commenced. The bill prays that the defendants may interplead, and for other relief. Padelford and Wilkinson answered, respectively alleging and denying the fraudulency of Whipple's assignment for the benefit of creditors. Trescott demurred to the bill, and this is the decision upon the demurrer. He assigned as grounds for demurrer: 1. That he was not a party to any suit pending between the complainant and the other defendants; 2. That he was not interested in any litigation pending between the other parties to the suit; 3. That there was not privity between all the parties to the suit; 4. That there was an adequate remedy at law for all the parties; 5. That interpleader tends to confuse the questions involved, and make the rights of parties depend upon rights of others, and upon rules of proceeding which deprive them of legal remedies; 6. That the bill deprives him of his witnesses by making them parties; 7. That it produces confusion in his obtaining his rights.

Manchester, for the demurrant.

Hayes and Matthewson, for the complainant.

By Court, AMES, C. J. Three shares of the capital stock of this bank are certainly claimed by the defendant Padelford to have been duly attached by him as the property of Whipple, and by the other two defendants to have been at the time of the attachment the property of the defendant Trescott, by virtue of a prior voluntary assignment made to him by Whipple, for the benefit of the latter's creditors. We do not know what is meant by the assertion in support of the demurrer that there is no privity between Trescott and Wilkinson, when the latter claims one of the shares in controversy by virtue of an alleged purchase of it from the former; nor by the suggestion that there is no priv-

ity between the bank and the defendants Trescott and Wilkinson, when both, in opposition to Padelford's attachment, claim that it is the duty of the bank to recognize one of them as the owner of two shares of the assigned stock and the other as the owner of one share, by virtue of their relation to the bank of inchoate stockholders. The truth is, that the attaching creditor sets up Whipple's title against the bank, and the assignee of Whipple, Trescott, and the purchaser from him, Wilkinson, set up Trescott's title to this stock, and this bank is attacked, or threatened to be attacked, or has reason to fear that it will be attacked, by all three. It is true that Trescott and Wilkinson, as against Padelford, are not joint claimants of the three shares attached by him; but distinctly claim, as stated in the bill, the former, two of them, with their dividends accrued and accruing, and the latter, one of them, with its dividends accrued and accruing. If, however, in a bill to be brought by a purchaser of these shares under Padelford's execution to set aside the assignment under which both claim as fraudulent and void, they may and must be joined, we see no more objection in joining them in this interpleading bill, as representing the whole interest in these shares and dividends, in opposition to Padelford, for the purpose of trying the same question as to the assignment, and no greater danger of confusion is likely to arise in such a trial from their joinder. The bill states, which is all that we have to do with on this demurrer, that Padelford claims these shares and the dividends accrued and accruing by virtue of his attachment, and Trescott and Wilkinson the same shares and dividends by virtue of Whipple's anterior assignment. It is admitted, therefore, by the demurrer, that the same subject is in controversy between these parties, and the bank seems to be the object, or threatened object, of attack of all three, itself having no interest whatever in the contested question which of the three shall prevail. We cannot see that this state of things has been produced by any fault of the bank, or that it has in any way so recognized the title of, or obliged itself to, either party as to preclude it from calling upon the court to compel all three to contest between themselves, and at their own cost, a matter in which it stands perfectly indifferent, and by the result of which it ought to be wholly unaffected.

Another objection to the bill stated on the part of Trescott under this demurrer, that he is no party to any suit, nor has an interest in any suit now pending between the other parties to the bill, cannot avail him. He certainly is alleged by the bill to

claim, and to threaten suit against the plaintiff as a claimant of, two shares of this stock under Whipple's assignment; and the very suit now pending against the bank for not transferring one share of the stock was caused by an assertion of his title in assigning it to a purchaser, the plaintiff in that suit. Having caused one suit, and admitted that he threatens another in support of the title attached by Padelford, he has no reason to complain if made a party to this bill in relief of the mere stakeholder, thus attacked by one suit through his agency, and now threatened with another by him.

The last objection insisted upon at the argument, that the remedy at law is sufficient for all parties, is, considering the subject of contest, fraud in an assignment for the benefit of creditors, hardly tenable as to any of them; a court of equity being the very forum in which such a question can best be litigated. But however this may be, we cannot see its application to the maintenance of this bill as an interpleading bill. The question now is merely, Does the bill state a case in which the defendants ought to be compelled to interplead in relief of the plaintiff?—the forum in which they shall litigate under this bill, whether at law or in equity, to be a matter of after consideration. This answers all the other objections to the bill, such as loss of evidence and supposed confusion from the change of forum, etc., even if they had an existence; since the court always takes care in such a case, as it has the power to do, that no right or equitable privilege of trial is lost by its interference to any party.

This demurrer must be overruled, and the defendant Trescott ordered to answer the bill.

BILL OF INTERPLEADER WHEN SUSTAINABLE: See *Adams v. Dickson*, 65 Am. Dec. 608, and cases cited in the note 611; see also the subject of interpleader treated in the note to *Shaw v. Coster*, 35 Am. Dec. 695-712.

THREATENED SUIT BY ONE OF CLAIMANTS IS GROUND FOR INTERPLEADER: *Yarborough v. Thomson*, 41 Am. Dec. 628.

SCHROEDER v. PATERSON.

[4 RHODE ISLAND, 516.]

ONE WHO CONTRACTS TO PURCHASE PROPERTY, GIVING TO HIS VENDOR MORTGAGE UPON OTHER PROPERTY to secure the payment of the purchase money, but who by a subsequent agreement secures the substitution of another in his place as purchaser, by the terms of which the mortgage remains security for the payment of the purchase money by the substitute, is neither a vendor of nor a co-purchaser with the substitute,

and obtains, by reason of the mortgage, neither a joint interest with the substitute in the property purchased nor a lien upon it, especially when by the agreement of substitution the title was to vest absolutely in the substitute.

BILL to enforce lien upon personal property, or to have partition of the same, to which a demurrer was filed for want of equity. The plaintiff contracted with Thurston, Gardner, & Co. for the construction of a steam-engine, boilers, and shafting for use in a print-mill, and it was stipulated that as security for the payment of the purchase price Thurston, Gardner, & Co. were to remain the owners of the property after it was placed in the mill and until payment in full; and as further security, the plaintiff executed to Thurston, Gardner, & Co. a mortgage upon certain copper printing-rollers belonging to him. Before any payment was made, another contract was made between the plaintiff, the defendant, and Thurston, Gardner, & Co., by the terms of which the defendant was substituted for the plaintiff in the former contract, it having been previously arranged that the defendant was to operate the mill and employ the plaintiff as manager. The contract of substitution stipulated that the defendant was to make a cash payment and give his notes for the balance, whereupon, differently from the former contract, the machinery and labor bestowed thereon were to be the property of the defendant from the time of the delivery of the machinery and the performance of the labor. And it was further stipulated that the mortgage given by the plaintiff to Thurston, Gardner, & Co. was to be held by them as security for the performance of the substituted contract by the defendant, and for the payment of all notes and other paper which might be given by him to the firm under that contract. The machinery was delivered, and the defendant made the cash payment and gave his notes for the balance of the price. The bill concluded with the averment that the defendant had failed to pay his notes and was insolvent, leaving the plaintiff's copper rollers subject under the mortgage for the payment of the same; and this it was supposed either gave the plaintiff a lien on the machinery to the value of the copper rollers, or made him a part owner of it in the proportion of that value to the value of the machinery, and thus entitled him to partition.

Farnsworth, for the demurrant.

Cossens, for the complainant.

By Court, Ames, C. J. The plaintiff's title to relief questioned by the demurrer depends upon whether he is, upon the facts stated in his bill, a joint owner of the steam-engine, etc., described in it, and so entitled to partition under the statute of this state, or, if not, whether he has a lien upon the same which equity calls upon us to recognize and enforce.

His joint ownership seems to us to be negatived by the express terms of the contract of November, 1855, entered into between the defendant, Thurston, Gardner, & Co., and himself, which stipulates that upon the defendant's making the cash payment, and giving his notes for the price of the steam-engine, shafting, etc., and labor on the same, the same "shall be the property of the said Paterson from the time of the delivery thereof upon the said works and the performance of the said labor." The bill states that the defendant did make the cash payment towards, and give his notes for the balance of, the price of the steam-engine, etc., and that they were delivered upon the works; and from these facts, coupled with the above words of the contract designed to mark out the rights of all parties in the property which formed the subject of it, we do not see what vestige of interest in the property is left in the plaintiff. We know of no legal machinery by the operation of which one who secures the price of a purchase by a mortgage of his property becomes a joint owner with the purchaser, especially when, as in this case, it is stipulated that the property, the price of which is thus secured, is to be vested in the purchaser. This disposes of the claim of the bill to equitable partition.

Next, does the bill show any lien on this property in the plaintiff which the court can declare and enforce?

It is not pretended that the agreements set forth in the bill give any lien by express terms to the plaintiff; but the court is asked to imply a lien in his favor on the property in question, because he has mortgaged some other property of his to secure a portion of the price of this. Upon what principle does such a fact give a lien in equity upon property the title to which has by the agreement of the claimant of the lien himself absolutely vested in the purchaser? The plaintiff is neither a vendor of this property to, nor a co-purchaser of it with, the defendant. He was, it is true, an original contractor for it, but ceded all his interest under his contract to the defendant, who was, in all respects, to take his place; the person with whom the plaintiff contracted, requiring a mortgage given by the plaintiff to remain as security for the performance of the contract by his substitute,

as the condition of his personal exemption. He has actually paid nothing, and may never pay anything, towards the price of this steam-engine and fixtures; but may, at this very moment, be contesting with one hand the right of Thurston, Gardner, & Co. to his copper rollers, under their mortgage upon them, whilst he stretches out the other for this lien by virtue of it. The two cases cited from Randolph's reports have no application to this.

In *Hays v. Wood*, 4 Rand. 272, the court held that one of two co-purchasers of land who has paid more than his share of the purchase money has a lien on the land to the extent of his advance. As we have seen, the plaintiff in this case is no joint purchaser of the property in question, and if he were, he has not paid more than his co-purchaser. He has paid nothing; all that has been paid has been paid by the defendant alone. *Hatcher v. Hatcher*, 1 Id. 53—a note of which only we have been able to procure—seems to have been the case of a surety in a bond for a deed of land, who, none of the purchase money having been paid, went into a court of equity to subject the land to the payment of the purchase money, in relief of himself as surety. By the usual terms of such a bond, the legal title is not to be conveyed to the purchaser until the purchase money is paid, but remains in the mean time in the hands of the vendor as a security for the purchase money. The bill in that case was probably nothing more than a bill by the surety of the purchaser against him and the vendor, to compel the latter to look to his lien on the land before looking to the surety; and if so, was brought to administer a well-known equity. Thurston, Gardner, & Co. have reserved no lien on this steam-engine and fixtures to which this bill seeks to compel them to look before proceeding against the plaintiff's copper rollers, and indeed, are not made parties to this bill. On the contrary, by the express terms of a contract to which this plaintiff himself was a party, they waived the lien originally reserved by them upon it, and agreed that upon delivery the property should become the absolute property of the defendant.

The demurrer is sustained, and no notice of a motion to amend having been given, the bill must be dismissed, with costs.

NO LIEN ARISES FOR PURCHASE MONEY LOANED BY THIRD PERSON to the purchaser of land; nor is such person privy to the sale: *Stansell v. Roberts*, 42 Am. Dec. 193.

RUSSELL v. BUCKLEY.

[4 RHODE ISLAND, 324.]

LETTER PROPERLY MAILED AND DIRECTED IS PRESUMED TO HAVE BEEN RECEIVED.

ASSUMPT. The defendant testified that he mailed at different times two letters, directed to the plaintiff, inclosing in each of them one half of the amount of the plaintiff's debt. The defendant requested the instruction that in the absence of proof to the contrary, the receipt of the money might be inferred from the testimony of the defendant as to the manner of mailing and directing the letters. The court refused the instruction, and the jury returned a verdict for the plaintiff. The defendant excepted.

Sheffield, for the defendant.

W. H. Cranston, for the plaintiff.

By Court, **AMES, C. J.** There must be a new trial in this case, on the ground of misdirection to the jury. It is true that if a miscarriage of the letters inclosing money, sworn to have been mailed by the defendant, had been proved, in the absence of proof of authority from the plaintiff or his wife thus to remit to them, the loss by the miscarriage must have fallen upon the defendant.

In the posture of the case, however, exhibited by the bill of exceptions, the defendant was entitled to the direction in substance requested by him—that if the jury believed, from the testimony, that the defendant had mailed letters, inclosing money, as he swore, they were authorized, in the absence of proof to the contrary, to presume that they were received by the plaintiff's wife. Such a presumption is in accordance with and is founded upon common experience, and is therefore known to the law as a presumption from the ordinary course of business. Further proof of the receipt of a letter than what is derived from proof of the proper direction and mailing of it would be wholly unnecessary, always difficult, and often impossible.

New trial granted, to be had at the next term of the court of common pleas for the county of Newport.

MAILING LETTER ADDRESSED TO PERSON AT HIS PLACE OF BUSINESS is *prima facie* evidence that he received it in the ordinary course of the mails: *Huntley v. Whittier*, 105 Mass. 392, citing the principal case.

STATE v. BROWN.

[4 RHODE ISLAND, 528.]

INDICTMENT UNDER RHODE ISLAND STATUTE CONCERNING FORGING OF BANK BILLS, and the uttering and having in possession counterfeit bank bills, must allege with due certainty that the bill was in imitation of or purported to be issued by some "corporation" "established as a bank," and some proof in support of this allegation must be introduced.

AT COMMON LAW, INDICTMENT FOR POSSESSING OR UTTERING FORGED BANK BILL with intent to defraud is not maintainable, since to constitute the common-law cheat somebody must have been defrauded or cheated.

INDICTMENT FOR POSSESSING OR UTTERING FORGED BANK BILL is maintainable in Rhode Island, without alleging that it was in imitation of or purported to be issued by some corporation established as a bank, though this allegation is necessary in an indictment under the statute concerning the forging of bank bills and the uttering and having in possession of counterfeit bank bills; for another statute provides an indictment for the forgery or criminal uttering of any promissory note or any writing whatever purporting to contain the evidence of any debt, contract, or promise, and a bank bill fairly comes within the purview of this section.

ALLEGATION IN INDICTMENT FOR CRIMINALLY UTTERING FORGED BANK BILL, that the bill was in imitation of a bill issued by a certain bank, requires proof of the existence of a genuine bank note upon such bank. **UTTERING AS TRUE NOTE PURPORTING TO BE ISSUED BY BANK** is an admission by the utterer of the existence of the bank sufficient to prove it in the absence of evidence to the contrary.

SCIENTIFIC, PROFESSIONAL, OR BUSINESS BOOKS OR PUBLICATIONS ARE NOT EVIDENCE of the facts stated therein, though admissible to show the state of invention, the course of composition, the meaning of words, or the theories or opinions prevailing in the age in which they were written.

WITNESS IS NOT COMPETENT TO TESTIFY TO GENUINENESS OF BANK NOTE who has never seen a genuine note of that bank, but whose knowledge of its notes is derived from fac-similes engraved or descriptions printed in a bank reporter or directory.

NO ONE IS COMPETENT TO TESTIFY TO GENUINENESS OF SIGNATURE who is not acquainted with the signer's handwriting from seeing him write, or from frequently seeing specimens of it, or from a comparison before the jury of the questionable handwriting with specimens of it, produced, admitted, or clearly proved to be not only genuine, but not got up for the occasion.

WITNESS IS INCOMPETENT TO TESTIFY TO GENUINENESS OF HANDWRITING who is acquainted with it only from printed descriptions and fac-similes.

ON INDICTMENT FOR CRIMINALLY UTTERING COUNTERFEIT BANK NOTES, it may be proved that the prisoner on the same day passed as genuine spurious as distinguished from counterfeit bank notes, and that when arrested he had several such notes both signed and unsigned in his possession, for the purpose of showing that he knowingly passed the counterfeit bill with the uttering of which he is charged.

INDICTMENT against Daniel Brown for having in his possession with intent to pass, and for passing with intent to defraud one Keating, a ten-dollar counterfeit bill of the Bank of Montgomery County, Pennsylvania. The first count charged him with having in his possession a counterfeit bank bill, "purporting to be, and in imitation of, a bank note" of the above bank, and in words and figures as follows: "The Bank of Montgomery County promise to pay ten dollars on demand to R. Magune or bearer," dated, and signed by the president and cashier, with intent to pass it as true, though knowing it to be false. The second count charged the uttering of the counterfeit bank note with knowledge of its falsity and with intent to defraud. To prove that the note was counterfeit, the prosecution called Weaver, who testified that he had been a bank cashier for thirty years, and was accustomed to handle money; that he believed there was such a bank as the Montgomery County Bank, and that the note in question was counterfeit; that he had no recollection of ever seeing any bills of that bank that appeared to be genuine, and his knowledge of the existence of the bank was derived from the bank-note directory, or like publications. This testimony was objected to by the prisoner's counsel, but the court admitted it. Subject to the same objection, the testimony of Mumford was admitted, who testified that he had been a bank cashier for many years, and was familiar with bank notes; that he thought there was such a bank as that named in the indictment, and that he must have seen a bill of such a bank, for in some way the name seemed familiar to him. He had seen the name of the bank in publications, but had no other knowledge of its existence. He thought the bill in question counterfeit. He had compared it with a fac-simile of a bill of that bank contained in a bank publication, and thought that the writing in the bill seemed stiffer than in the fac-simile. For the purpose of proving that the prisoner knew that the note uttered by him was counterfeit, and contrary to the objection of the prisoner's counsel, the court admitted evidence that the defendant, at the same time and at the same gambling sitting, passed to Keating, as change for a five-dollar bill, two spurious unsigned bank bills, and that upon the arrest of the prisoner there were found upon his person other spurious, as distinguished from counterfeit, bank bills, both signed and unsigned, and these were laid before the jury. To the admission of this evidence, and to the charges of the court, exceptions were taken by the prisoner's counsel.

Sheffield, for the prisoner.

Hart, attorney-general, for the state.

By Court, Ames, C. J. This indictment seems to have been treated below and in the argument before us as if found and to be maintained under the sixty-ninth and seventieth sections of the act concerning crimes and punishments: Dig. 1844, 390. Those sections, which are to be read with the sixty-eighth section of the same act in order to be understood, relate, so far as bank bills or bank notes are concerned, to the uttering of counterfeit bank bills knowing them to be counterfeit, and with intent to defraud, and the having such bills in possession with such knowledge and intent, only when in imitation of or purporting to be bank bills, issued by some "corporation, which is, or hereafter may be, established as a bank in this state or elsewhere." Such is the precise language of the sixty-eighth section, which relates to the forging of bank bills, and the sixty-ninth and seventieth sections relating to the criminal uttering and having in possession of bank bills, import the same limitation by the words "any such false," etc., "bank bill or note," found in both of them. To describe, therefore, an offense against either of these sections, the indictment should allege with due certainty that the forged note criminally uttered or possessed was in imitation of or purported to be a bank bill issued by some corporation established as a bank; and in such case, some proof of the establishment of the corporation as a bank (what it is not necessary now to decide), must be given to satisfy this necessary allegation.

The indictment before us, however, contains no such allegation, and could not therefore be maintained under either of those sections. In this respect, it will be noticed that these sections of our statute differ materially from the statute of New York, to the exposition of the words of which the cases of *People v. Davis*, 21 Wend. 310-313, and *People v. Peabody*, 25 Id. 472, have been cited on the part of the state. The words of that act are, or were, "issued or purporting to have been issued by any corporation or company duly authorized by the laws of the United States, or of this state, or of any other state, government, or country"—words which include the forgery, etc., of the bills of all banks, whether incorporated or not.

Nor is this indictment maintainable at common law. The offense of actually obtaining money or other valuable thing by the use of a false token is undoubtedly punishable at common

law as a cheat; but to constitute such a misdemeanor at common law, somebody must have been defrauded or cheated; whereas this indictment merely charges in one count the possessing, and in the other the uttering, of the forged bank bill with an intent to defraud: 2 East P. C. 825, 826. The indictment is, however, maintainable in our view under the seventy-second section of the act concerning crimes and punishments (Dig. 1844, 390, 391), which enumerates amongst the many instruments the forgery or criminal uttering of which, when forged, is to be duly punished, any "promissory note," and finally, "any writing whatever purporting to contain the evidence of any debt, contract, promise, etc." A bank note, such as this indictment describes and sets forth, is "a promissory note," and at least purports to contain the evidence of a debt, contract, or promise on the part of the bank; and fairly comes within the purview of this section, whether the bank be incorporated or not: *Brown v. Commonwealth*, 8 Mass. 64; *Commonwealth v. Carey*, 2 Pick. 47, 49, 50; *Commonwealth v. Riley*, Thach. Cr. Cas. 67.

We have called attention to the section under which we deem this indictment sustainable, that we may occupy a proper position from which to discern whether any evidence of the existence of the Montgomery County Bank was necessary to be given to the jury in order to convict the prisoner under it. The absence of competent evidence to prove its existence being the first exception, in proper order, to the rulings and charge of the court below. Now, this section punishes not only the forging and uttering with a criminal intent of the forged instrument in imitation of something actually existing, or made by some person or corporation actually existing, but, as we have seen, the false making, or uttering with the criminal knowledge and intent, of "any writing whatever purporting to contain evidence of any debt, contract, promise, etc.;" that is, as we construe it, of any writing professing on its face to contain such evidence. In this view, had the indictment simply charged, as it might have done, that the prisoner uttered a forged note with the criminal knowledge and intent, purporting to be the promissory note of the Montgomery County Bank, or a writing containing evidence of a promise by the Montgomery County Bank, we mean, of course, with due certainty, no evidence of the existence of the bank, either as a corporation or association, would have been necessary, since the crime described by this section of the statute would have been set forth in the indictment, and might be

fully proved, whether such a bank existed or not: *People v. Davis*, 21 Wend. 310, 312, 313, and cases cited. If, indeed, the allegation was that the fraudulent uttering was with intent to defraud the bank, proper proof of the existence of the bank would be requisite: *People v. Peabody*, 25 Id. 472.

The indictment before us, however, does not so describe the offense committed by the prisoner; but alleges that the note criminally uttered by him "was in imitation of, and purported to be, a bank note issued," etc. As descriptive of the particular offense charged, and of the instrument and means by which it was committed, we deem this allegation so far material that some proper proof should have been submitted to the jury to support it. An imitation supposes something to be imitated; an imitated bank bill supposes a genuine bank bill, issued, of course, by some existing bank. Although we do not think that in a case in which it was necessary to prove the existence of a bank, reputation, and therefore the statement of the fact in a printed publication, would be sufficient, yet we do think that the uttering as true a note purporting to be issued by a bank is an admission or statement of the existence of the bank by the utterer of the strongest character; and certainly, in the absence of all proof to the contrary, as in this case, quite sufficient to prove its existence: *United States v. Foye*, 1 Curt. 365, 366. With proof of this sort in the case, if the mere question had been whether the Montgomery County Bank existed or not, we should not have been disposed to grant a new trial because the judge below charged the jury that reputation alone was sufficient evidence of the existence of the bank, however mistaken we might have deemed him to be.

The allegation, however, that the uttered bill was in imitation of, as well as purported to be issued by, the Montgomery County Bank, we have already said we deem to be material. Indeed, in such a case, not only do the cases and text-books suppose some proof of imitation necessary, but define the degree of resemblance necessary to be proved, nearly in the words of the learned judge who tried this case below, as such as would impose upon persons of ordinary observation: 2 Stark. Ev. 579; 2 East P. C. 951, 952; *State v. Carr*, 5 N. H. 367. The exception, therefore, taken to the evidence offered in support of this allegation, involving also, as it seems to us to do, an exception to, or at least bringing before us, the kind of evidence by which the forgery itself was proved, next demands our attention.

Without going into a critical analysis either of the rulings

upon the testimony or of the charge, it sufficiently appears from the bill of exceptions before us that the fact that the bill uttered was an imitation of the genuine bills of this bank as alleged, or even that it was a forged bill of this bank, rested wholly upon the testimony of two witnesses; one of whom swore that he had never seen a genuine bill of the bank, and knew nothing about the bank or its existence except what he had derived from some printed bank reporter or directory, and the other of whom could not swear with certainty to any other source of knowledge, and seems to have come to a conclusion that the bill was forged, from a comparison between the handwriting in the bill uttered and a fac-simile of the handwriting in a fac-simile of a bill of this bank found by him in some similar publication. It is hardly necessary to say that printed books or publications of any sort are not received in courts of justice as evidence of any fact stated in them, however practically useful they may be as guides to professional or business men. It is indeed true, as suggested, that much of the scientific knowledge of experts in medicine, surgery, mechanics, chemistry, etc., is derived from books; and the knowledge of experts in any of the arts founded upon science would in general be small indeed had they not availed themselves of the fruits of the research and experience of their predecessors as taught in books. Yet even in such a case, the scientific book would be no evidence of any fact stated in it interesting to an issue on trial in a court of law; nor a historic work, of the happening of any event related in it, to be found by a jury; though valuable and admissible for the purpose of showing, when necessary to be shown, the state of invention, the course of composition, the meaning of words, or the theories or opinions which prevailed in the age in which they were written: See *Darby v. Ouseley*, 36 Eng. L. & Eq. 519, 524-526, 529, 531, in which this matter was recently considered by the court of exchequer. Much less can ephemeral publications, such as bank directories or reporters, be referred to or produced in court in proof of any fact stated in them; or the fac-similes of bank bills, printed in them, be employed as standards of comparison, to which bills charged as counterfeit are to be referred for the purpose of proving either their general resemblance to or special difference from the genuine bills of the bank. Nor, however expert he may be as a detector of bad money in general, do we deem any witness qualified to instruct a jury whether a particular note counterfeits another or others

of the same bank who has never seen a genuine note of that bank, but whose whole knowledge of its notes is derived from engraved fac-similes, or printed descriptions, for the accuracy or even honesty of which we have no voucher. It is within every man's experience that many genuine bills of distant banks have been condemned as counterfeits by experts on account of bad engraving or even bad paper, they having no knowledge of the engraving or paper actually employed. As to the handwriting in the body of the bill, or of the signatures of the president and cashier, the rule is well settled that no one is competent to swear to its being either genuine or forged who is not acquainted with his handwriting from seeing the writer write, or from frequently seeing genuine specimens of it in the usual course of business; or, which is an American extension of the sources of such knowledge by no means universal, from a comparison before the jury of the questionable handwriting, with specimens of it produced, admitted, or at least fully and clearly proved to be not only genuine, but not got up for the occasion. It is evident that he who is acquainted with the genuine handwriting only from printed descriptions and fac-similes is qualified to swear with regard to it in none of these accustomed modes. Nor do we deem that the seventy-seventh section of the act concerning crimes and punishments (Dig. 1844, 392) was designed to introduce so loose a practice in so grave a matter as a criminal charge of this degree as to allow persons to swear to the handwriting on, or to the genuineness or falsity of, bank bills, who could not certainly say that they had any other knowledge of either than what they had derived from a bank reporter. The latter clause of that section, to which we have been referred, is, "but the testimony of any competent witness, who is acquainted with the handwriting of the person, or who has knowledge of the difference of true and counterfeit or altered bank bills, and who is skilled therein, shall be received as competent evidence to prove any such bank bill or note to be false, forged, counterfeited, or altered." After dispensing, in certain cases, with a supposed necessity, unknown to the common law, of calling the party whose name is forged to prove the fact, the section proceeds, in the words just quoted, to specify the kind of proof to the forgery which may be substituted. By the express words of the section, however, the witness must be "competent," and so far as knowledge of the difference between true and counterfeit bills is concerned, must be "skilled therein,"

leaving the standard of both competency and skill to be fixed by the courts under the general law.

In conclusion upon this point, we do not think the witnesses to resemblance of forgery called by the government well skilled or competent, according to any rule of law known to us, to swear to the matter to which their testimony was received; nor do we think it safe that a conviction should rest upon testimony so loose and uncertain; and upon this ground there must be a new trial, as requested by the prisoner.

This disposes of the motion; but as our attention has been called, at the argument, to another ground upon which it was made, we may as well dispose of it for the purposes of the new trial. We refer to the admission by the judge of proof that the prisoner, on the same day and at the same gambling sitting, passed as genuine spurious, as distinguished from counterfeit, bank bills, and that when arrested he had several such bills, both signed and unsigned, in his possession, for the purpose of showing that he knowingly passed the counterfeit bill with the uttering of which he was charged.

It is very true that no case that we have seen has gone to the precise point of the admissibility of such testimony for the above purpose. The passing and possession of other counterfeit bills of the same denomination, or of other denominations, and purporting to be bills of the same or other banks, have been familiarly proved for the purpose of showing the *scienter* of the prisoner in passing the particular counterfeit bill charged. The notion upon which the admissibility of such testimony is based, according to an eminent writer on the criminal law of Scotland, is the tendency of such evidence to prove that the prisoner is a dealer in such paper, caught in the very act of disposing of it, instead of a casual receiver and innocent passer of the particular bill traced back to him: Allison on the Principles of the Criminal Law of Scotland, 420. In this view, it does not seem to us to affect the bearing of the evidence upon the question of *scienter* whether the bills be spurious or counterfeit. The two crimes may be technically different; but they are of precisely the same kind in this, that they indicate the prisoner to be a dealer in bad bank paper, and so indicate that he did not innocently pass the counterfeit bill with the uttering of which he is charged. Within the principle, we think, therefore, that the evidence was admissible, and see no ground for this exception.

New trial granted, to be had at the next term of the court of common pleas in the county of Newport.

EXPERTS CONCERNING HANDWRITING, COMPETENCY OF: See note to *Hammond v. Woodman*, 66 Am. Dec. 240-242.

GENUINE SIGNATURES MUST BE USED AS STANDARDS OF COMPARISON: *Commonwealth v. Eastman*, 48 Am. Dec. 596; *Baker v. Haines*, 36 Id. 224.

PROFESSIONAL OR SCIENTIFIC WORKS ARE NOT ADMISSIBLE IN EVIDENCE: *Melvin v. Easley*, 62 Am. Dec. 171; *Luning v. State*, 52 Id. 153; *Ashworth v. Kittridge*, 59 Id. 178, and note 180-187.

TO SUSTAIN INDIOTMENT FOR FORGERY, IT MUST BE BROUGHT WITHIN STATUTE: *State v. Morton*, 65 Am. Dec. 201.

BANK CHECK MAY BE DESCRIBED AS ORDER FOR MONEY OR AS BILL OF EXCHANGE, in indictment for forgery: *State v. Morton*, 65 Am. Dec. 201.

FORGER OF ACCEPTANCE OF BANK CHECK IS ESTOPPED FROM DENYING authority of teller whose name is forged: *State v. Morton*, 65 Am. Dec. 201.

EVIDENCE THAT PRISONER HAS UTTERED OR PASSED OR HAD IN HIS POSSESSION other forged or counterfeit notes or bank bills is admissible to prove the scienter: *McCartney v. State*, 56 Am. Dec. 510; *State v. Williams*, 45 Id. 741; see *State v. Spaulding*, 48 Id. 158.

STATEMENT IN INDIOTMENT AND PROOF OF INCORPORATION OF BANK upon which writing is alleged to have been forged: See *State v. Jones*, 36 Am. Dec. 257.

PROOF OF EXISTENCE OF BANK IS NOT NECESSARY TO PROOF OF FALSITY OF FORGED NOTE: *McCartney v. State*, 56 Am. Dec. 510, note 512.

WHAT CONSTITUTES FORGERY: See note to *Arnold v. Cost*, 22 Am. Dec. 306-321.

STATE v. McCUNE.

[5 RHODE ISLAND, 60.]

EXPRESSED DETERMINATION OF FELONIOUS INTENT, ACCOMPANIED BY FORCE SUFFICIENT TO CARRY INTENT INTO EFFECT, makes a case of taking by open violence or robbery, as distinguished from a secret taking or mere snatching by surprise from the hand of another.

FACT THAT SURPRISE AIDED FORCE EMPLOYED BY PRISONER will not prevent the force employed from aggravating the case to one of robbery.

TAKING WATCH FROM PERSON IS ROBBERY, where the prisoner passed his arm through the arm of the prosecutor and used violence sufficient to break the ribbon watch-guard worn by the prosecutor about his neck, at the same time exclaiming, "Damn you, I will have your watch!" notwithstanding the force did not affright, but merely surprised, the prosecutor.

INDICTMENT charging highway robbery in one court and stealing from the person in another. Shortly before the commission of the offense the prosecutor and the prisoner, who was a stranger to the prosecutor, had been walking arm in arm, the prisoner having volunteered to conduct the prosecutor to a place where he could procure a carriage to take him home. The prosecutor not succeeding in obtaining a conveyance in the

prisoner's company, left him and proceeded alone in his search. Shortly afterwards he was again joined by the prisoner, who passed one arm through the arm of the prosecutor, and with his other hand seized the watch of the prosecutor, exclaiming, "Damn you, I will have your watch!" and fled with it, pursued by the prosecutor. The watch was in the prosecutor's vest pocket, and was attached to a silk ribbon watch-guard about half an inch wide, which passed about his neck. This watch-guard the prisoner broke in taking the watch. The prosecutor was asked whether he was in fear, and replied, "I was much afraid that he would get my watch." The verdict was, guilty of highway robbery; but it appearing that this crime was not cognizable by a single justice, the verdict was set aside, and the cause submitted to the full court upon an agreement that if the court were of the opinion that the above facts constituted the crime of highway robbery, as distinguished from that of stealing from the person, the prisoner should plead guilty to the former, otherwise to the latter crime.

Hart, attorney-general, for the state.

Ripley, for the prisoner.

By Court, AMES, C. J. We all agree that this is a case of robbery, upon the ground that the felonious taking was effected by force. The passing by the prisoner of his arm through the arm of the prosecutor, and the violence used by him in breaking the ribbon guard about the neck of the prosecutor, accompanied by the prisoner's open announcement at the time of his determination to take the watch, make, in our judgment, a stronger case of taking by violence than *Rex v. Mason*, Russ. & Ry. 410, in which the taking was accompanied only by the force necessary, by two or three jerks, to break the steel guard-chain about the neck of the prosecutor, without any announcement of purpose by way of threat, or any laying on of hands. The expressed determination, at the time, of the felonious intent, accompanied by the degree of force requisite to carry the intent into effect, make this a clear case of a taking by open violence, as distinguished from a secret taking, or a mere snatching by surprise from the hand of another. If there be violence sufficient to effect the evil intent, its degree does not seem to be of importance in characterizing the crime, as appears from the case mentioned by Holroyd, J., 1 Lew. C. C. 300, in which the judges held that the running of the prisoner against the person of another for the purpose of diverting his attention whilst he

picked his pocket was sufficient force to make the taking robbery, since it was used with that intent. The fact that surprise aided the force employed by the prisoner to enable him to accomplish his purpose will not prevent the force employed from aggravating the case to one of robbery.

The prisoner was accordingly sentenced for the crime of highway robbery.

WHAT CONSTITUTES ROBBERY.—Robbery is a taking of anything of any value belonging to another from the person or presence of another, against his will, by means of force or fear, and with an intent to steal it. Lord Coke, Lord Hale, and Sergeant Hawkins define robbery as the felonious and violent taking of anything of value from the person of another, putting him in fear; and Mr. Bishop says that “robbery is larceny committed by violence from the person of one put in fear:” Co. Inst. 68; 1 Hale P. C. 532; 1 Hawk. P. C. 212; 2 Bishop Crim. L., sec. 1156. But as robbery may be committed either by violence or putting in fear, the above definition is the correct one: 2 East P. C. 707; 4 Bla. Com. 242; 1 Whart. Crim. L., sec. 847; *McDaniel's Case*, Fost. 121; S. C., 19 How. St. Tr. 745, 806; *United States v. Jones*, 3 Wash. 209; *United States v. Simms*, 4 Cranch C. C. 618; *United States v. Wilson*, Baldw. 93; *Clary v. State*, 33 Ark. 561; *Long v. State*, 12 Ga. 293; *Seymour v. State*, 15 Ind. 288; *Shinn v. State*, 64 Id. 13; S. C., 31 Am. Rep. 110; *State v. Brewer*, 53 Iowa, 735; *Glass v. Commonwealth*, 6 Bush, 436; *Commonwealth v. Humphries*, 7 Mass. 242; *McDaniel v. State*, 8 Smed. & M. 401; S. C., 47 Am. Dec. 93; *State v. Broderick*, 59 Mo. 318; *State v. Gorham*, 55 N. H. 152; *State v. Burke*, 73 N. C. 83; *State v. Cowan*, 7 Ired. L. 239; *Commonwealth v. Snelling*, 4 Binn. 379; *Crews v. State*, 3 Coldw. 350; *Hammond v. State*, Id. 129. If the indictment allege force and violence, it need not allege a putting in fear, and vice versa: Id. If force be used, it is not essential that the prosecutor should be either aware or afraid of the taking, as where the prisoner took hold of the prosecutor's cravat and pressed him against a wall, at the same time taking his watch without his knowledge: *Commonwealth v. Snelling*, 4 Binn. 379. So fear alone, without the exhibition of actual force, is sufficient: See *infra*. In Texas, however, the rule, under the statute of that state, is, that where the taking is by assault there need be no putting in fear, but when it is by violence there must be a putting in fear; and a conviction on the ground of a putting in fear cannot be sustained under an indictment for an assault and putting in fear, but the indictment must allege “violence and putting in fear.” Without the allegation of violence in connection with the putting in fear, the indictment is defective: *Kimble v. State*, 12 Tex. App. 420; *Williams v. State*, Id. 240, modifying the rule of *Wilson v. State*, 3 Id. 63, where it was held that whether the offense be committed by assault or by violence, the indictment must allege, in addition, a putting in fear of life or of bodily injury.

Robbery is said to be a compound larceny composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking: 2 Bishop Crim. L., sec. 1158; see *Long v. State*, 12 Ga. 293; *Commonwealth v. Humphries*, 7 Mass. 242; *Crews v. State*, 3 Coldw. 350; *Hammond v. State*, Id. 129; *People v. Nelson*, 56 Cal. 77. “The indictment for robbery charges a larceny, 2 Bishop's Crim. Proc., sec. 1002; *Mathews v.*

State, 4 Ohio St. 539, together with the aggravating matter which makes it in the particular instance robbery. For example, the property is described the same as in an indictment for larceny: *Brennon v. State*, 25 Ind. 403; *McEntee v. State*, 24 Wis. 43; the ownership is in the same way set out: *Commonwealth v. Clifford*, 8 Cush. 215; *Smedly v. State*, 30 Tex. 214; *People v. Vice*, 21 Cal. 344; *Crews v. State*, 3 Coldw. 350; 2 Bishop's Crim. Proc., sec. 1007. Then if the aggravating matter is not proved at the trial, the defendant may be convicted of simple larceny: 1 Bishop Crim. L., sec. 1055; *State v. Jenkins*, 36 Mo. 372;" see *infra*, "Conviction of Larceny," etc. The property taken must be the subject of larceny: *State v. Trexler*, 2 Car. Law Repos. 90; S. C., 6 Am. Dec. 558 (what articles are the subject of larceny, see note to *State v. Homes*, 57 Id. 276, 277); 1 Whart. Crim. L., sec. 846. And where a statute makes something the subject of larceny which was not so at common law, then it follows by legal consequence that it is robbery to take this thing from another person violently or by putting him in fear: 2 Bishop Crim. L., sec. 1160; see *Rex v. Cannon*, Russ. & Ry. 146; *Regina v. Hemmings*, 4 F. & F. 50; *McEntee v. State*, 24 Wis. 43; *State v. Carro*, 26 La. Ann. 377.

We have used the expression "actual or constructive force." It is a phrase of occasional occurrence in the books. Actual force means personal violence, and occurs where injury is done to the person, or where there is a struggle to retain possession of the property: *Long v. State*, 12 Ga. 293. Constructive force is a putting in fear. When one is put in fear of an injury to his person or his property, or to his character, by a charge of an unnatural crime, this is constructive force: *Long v. State*, 12 Ga. 293; see also *Shinn v. State*, 64 Ind. 13; S. C., 31 Am. Rep. 110; *Commonwealth v. Humphries*, 7 Mass. 242; *Hammond v. State*, 3 Coldw. 129; *Crews v. State*, Id. 350. The prosecution must establish guilt beyond a reasonable doubt: *People v. Core*, 59 Cal. 390. In some states statutes make a special crime of stealing from the person where the taking is not sufficiently aggravated to make the offense robbery: See *Woodard v. State*, 9 Tex. App. 412. In the United States statutes, where the word "rob" is used it is used in its common-law sense: *United States v. Wilson*, Baldw. 93; *United States v. Palmer*, 3 Wheat. 610; *United States v. Jones*, 3 Wash. 209.

The definition of robbery at the beginning of this note contains statements of the essential facts constituting the crime of robbery. These statements will be treated in the order in which they occur in that definition, as follows: 1. The asportation; 2. The thing taken and its value; 3. The ownership; 4. From the person or presence of another; 5. Against the will of the prosecutor; 6. The force; 7. The fear; 8. The *animus furandi*.

ASPORTATION.—There must be an actual taking and carrying away: 2 Bishop Crim. L., sec. 1161; 1 Whart. Crim. L., sec. 849; *Rex v. Farrell*, 1 Leach, 322; *Commonwealth v. Clifford*, 8 Cush. 215; *State v. Curtis*, 71 N. C. 56; *Jordan v. Commonwealth*, 25 Gratt. 943. "If A have his purse tied to his girdle and B assaults him to rob him, and in struggling the girdle breaks and the purse falls to the ground, this is no robbery, because no taking. But if B take up the purse, or if B had the purse in his hand and then the girdle break, and striving lets the purse fall to the ground and never takes it up again, this is a taking and a robbery:" 1 Hale P. C. 533, citing 3 Inst. 69; Dalt. Just., c. 100; Crompt. 35. Where the defendant snatched a lady's ear-ring from her ear, in so doing tore her ear, and left it in the "curls of her hair," this was a sufficient asportation: *Rex v. Lapier*, 1 Leach, 320; but see the authorities on "snatching," *infra*. There must be a carrying away. Thus, where the prosecutor upon command dropped the property, but the prisoner was ar-

rested before he could seize it, it was not robbery: *Rex v. Furrell*, Id. 322. An indictment lies for the final asportation, as where the owner dropped accidentally the article taken, and the prisoner picked it up and refused to deliver it, whereupon a struggle ensued for its possession, this struggle will be a reduction to possession by the owner, and its final asportation by force or fear will be robbery: *State v. Trexler*, 2 Car. Law. Repos. 90; S. C., 6 Am. Dec. 558. But the crime is complete, though the prisoner afterwards return the property taken: 1 Hale P. C. 533; *Peat's Case*, 1 Leach, 228. The asportation need not be alleged: *Terry v. State*, 13 Ind. 70.

THING TAKEN AND ITS VALUE.—It must be the subject of larceny, and therefore the taking of a bank note is not robbery: *State v. Trexler*, 2 Car. Law Repos. 90; S. C., 6 Am. Dec. 558. But in Ohio bank notes are "personal property" within the robbery statute: *Turner v. State*, 1 Ohio St. 422. Something must be actually taken: 1 Hale P. C. 532; *James v. State*, 53 Ala. 380. Still, where one forces another by threats or violence to take less than the value of his goods, this is robbery: *Rex v. Simons*, 2 East P. C. 712; *Spencer's Case*, Id. The thing taken must be of some value. Therefore to obtain from a person his promissory note by threatening with a knife held to his throat to take his life is not a felonious stealing of the note, for it never was of value to or in the peaceable possession of such person: *Rex v. Philpoe*, 2 Leach, 673; S. C., 2 East P. C. 599; see also *Rex v. Edwards*, 6 Car. & P. 515; S. C., Id. 521; *Regina v. Smith*, 2 Den. Cr. C. 449; note to *State v. Homes*, 57 Am. Dec. 276. But its value is immaterial, and however insignificant, it is robbery to take it: *Regina v. Morris*, 9 Car. & P. 349; *Rex v. Clark*, Russ. & Ry. 181; *Rex v. Bingley*, 5 Car. & P. 602; *Williams v. State*, 10 Tex. App. 8; *Wesley v. State*, 61 Ala. 282; *James v. State*, 53 Id. 380; *State v. Howerton*, 58 Mo. 581; *State v. Burke*, 73 N. C. 83; *Crews v. State*, 3 Coldw. 350; *Hammond v. State*, Id. 129; *Clary v. State*, 33 Ark. 561. Lord Hale says the taking is robbery whether the thing taken be above or under the value of one shilling: 1 Hale P. C. 531. It must be of some value, but need not be of the value of the smallest coin in the realm at least, that is, of a farthing: *Regina v. Morris*, 9 Car. & P. 349. If it is of value to the prosecutor alone, it is sufficient: *Rex v. Bingley*, 5 Car. & P. 602 (memorandum of debt) *Rex v. Clark*, Russ. & Ry. 181. It is not necessary to prove that the property had a specific pecuniary value. It is sufficient that it was not worthless, that it was not wholly unfit for use, or that the owner kept and preserved it as of value to him, although its pecuniary value was nominal, insignificant, or incapable of estimation: *Jackson v. State*, 69 Ala. 249; *James v. State*, 53 Id. 380. It is not necessary to allege a value for the property taken, since force or fear is the main element of the crime: *State v. Burke*, 73 N. C. 83; *Williams v. State*, 10 Tex. App. 8 (sheep); *Commonwealth v. Brooks*, 1 Duv. 150; *James v. State*, 53 Ala. 380 (sack of flour and a jug of whisky); *contra*: *Jackson v. State*, 69 Id. 249. The verdict need not specify the value of the property taken: *State v. Howerton*, 58 Mo. 581. The genuineness and value of the coins charged to have been taken is sufficiently shown by the testimony of the person robbed that he was robbed of two hundred and forty-five dollars in gold, mostly in twenty-dollar gold pieces, but partly in ten and five dollar pieces, and also that he was robbed of forty-five or fifty dollars in silver dollars: *State v. Hevlin*, 21 N. W. Rep. 645.

OWNERSHIP.—A person cannot be guilty of robbery in taking his own property, whatever other offense he may commit in the taking: *Smedly v. State*, 30 Tex. 214; *Barnes v. State*, 9 Tex. App. 128; *People v. Vice*, 21 Cal. 344. He may commit larceny in so doing (note to *State v. Homes*, 57 Am. Dec. 277, 278), or trespass. A creditor who compels the payment of his debt by the use

of violence is not guilty of robbery, since there is no *animus furandi*: *Regina v. Hemmings*, 4 F. & F. 50. Indeed, the lack of the felonious intent is the reason that the taking of one's own property cannot be robbery. So where the taking is under a *bona fide* impression of ownership in the prisoner, it is not robbery: See *infra*, "Animus Furandi." Therefore it must be charged in the indictment that the thing taken was the property of another than the prisoner: *People v. Vice*, 21 Cal. 344. The indictment must by appropriate averment show that the property taken belonged to some person other than the accused, or that the person deprived of its possession was entitled thereto as against the accused: *Barnes v. State*, 9 Tex. App. 128; *Commonwealth v. Clifford*, 8 Cush. 215. It should state clearly the ownership of the property, as well as the name of the person from whom it was taken: *Smedly v. State*, 30 Tex. 214. But an indictment averring that the property taken belonged to another than the person robbed is not defective because it fails to allege that it was taken against the will of the owner, and also fails to allege the character of the possession of the person from whom it was taken: *People v. Shuler*, 28 Cal. 490. Proof that the property was taken from the person of another without any claim of right on the part of the defendant is sufficient proof of ownership: *People v. Nelson*, 56 Id. 77. The property taken need not belong to the person robbed. As against the robber, he is the owner of all goods in his possession and custody: *Brooks v. People*, 49 N. J. L. 436; S. C., 10 Am. Rep. 398. But in *Crews v. State*, 3 Coldw. 350, it was said that the property must be proved to belong to the person named in the indictment as the owner. Goods stolen out of possession of a bailee may be described as the property of the bailor or of the bailee, although the goods were never in the real owner's possession: *State v. Gorham*, 55 N. H. 152.

FROM PERSON OR PRESENCE OF ANOTHER.—Primarily, the taking must be from the person of the party robbed, and the indictment must so allege: *Rex v. Philpoe*, 2 Leach, 673; S. C., 2 East P. C. 599; *People v. Beck*, 21 Cal. 385; *Stegar v. State*, 39 Ga. 583; *Seymour v. State*, 15 Ind. 288; *State v. Leighton*, 56 Iowa, 595; see *State v. Kegan*, 62 Id. 106; *Kit v. State*, 11 Humph. 167. And if the indictment merely state that the taking was from "another person," it is fatally defective: *People v. Beck*, 21 Cal. 385. But a taking in the owner's presence or view is constructively a taking from his person, but the owner's presence is at least necessary: *Rex v. Francis*, 2 Stra. 1015; S. C., 2 Com. 478; *Crocker v. State*, 47 Ala. 53; *James v. State*, 53 Id. 380; *Clary v. State*, 33 Ark. 561; *Hope v. People*, 83 N. Y. 418; S. C., 38 Am. Rep. 460; *Turner v. State*, 1 Ohio St. 422; *State v. Jenkins*, 36 Mo. 372; *United States v. Jones*, 3 Wash. 209; *Crews v. State*, 3 Coldw. 350; *Hammond v. State*, Id. 129. "If a thief," says Lord Hale, "come into the presence of A, and with violence and putting A in fear drives away his horse, cattle, or sheep," the offense is robbery: 1 Hale P. C. 533. And Mr. East states the doctrine thus: "It is sufficient if the property be taken in the presence of the owner; it need not be taken from his person, so that there be violence to his person or putting him in fear; as where one, having first assaulted another, takes away his horse standing by him, or having first put him in fear drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head:" 2 East P. C. 707. "Or robs my servant of my money before my face:" 1 Hawk. P. C. 214, sec. 5. Where by intimidation the owner is compelled to open his desk from which his money is taken or to throw down his purse which the robber picks up, it is robbery: *United States v. Jones*, 3 Wash. 209. 216. Where a person traveling in company with the owner is in-

trusted with the goods taken to help carry them, and by violence feloniously exerted against the person of the owner carries off the goods, he is guilty of robbery; for his possession of the goods up to the time of the felonious violence is constructively the possession of the owner, and the taking in his presence is constructively from his person: *James v. State*, 53 Ala. 380. It has been held that where the property taken belonged to the person assaulted, but was in the possession of another person who was walking with him and carrying the property, and this person threw it down and came to the assistance of the owner, whereupon the thief carried it away, the offense was not robbery, because the property was not in the custody of the prosecutor: *Rex Fallows*, 5 Car. & P. 508. But in view of the above authorities, this case is perhaps hardly authoritative. Stealing a watch from the room in which the owner was sleeping was not stealing from the person, though doubts were expressed as to whether it might not have been so had the owner been awake: *Rex v. Hamilton*, 8 Id. 49. Under the Pennsylvania statute, it is not necessary, when the word "rob" is used, to allege that the property was taken from the body of the prosecutor: *Acker v. Commonwealth*, 94 Pa. St. 284.

AGAINST WILL OF PROSECUTOR.—The taking must be against the will of the person robbed: *Rex v. McDaniel*, Fost. 121, 128; S. C., 19 How. St. Tr. 745, 806; *People v. Clough*, 59 Cal. 438; *Seymour v. State*, 15 Ind. 288; *Long v. State*, 12 Ga. 293; *State v. Jenkins*, 36 Mo. 372; *State v. Johnson*, Phill. L. 140. Where the prosecutor consents to be robbed, *People v. Clough*, *supra*, *Rex v. McDaniel*, *supra*, simply for the purpose of prosecuting the robber, it is not robbery: *Rex v. Fuller*, Russ. & Ry. 408; see also 1 Whart. Crim. L., secs. 141 et seq.; but see 1 Bishop Crim. L., sec. 438. Although a consent to be robbed merely for the purpose of prosecution is not robbery, yet in *Norden's Case*, Fost. 129, a robbery was committed. Norden set out in a post-chaise to accompany a stage-coach and apprehend a highwayman who had frequently robbed the coach. He put a little money and a pistol in his pocket. When the highwayman met them and presented his weapon, Norden delivered up his money, and then with the assistance of others captured the robber. The prisoner was convicted for a robbery upon Norden, and this was not a case of robbery by consent, for there was no collusion between Norden and the prisoner: *Norden's Case*, *supra*. "At the same time, as in the parallel case of rape 'against the will,' if there be force, it is to be treated as convertible with 'without consent:'" 1 Whart. Crim. L., sec. 855; and therefore where the defendant knocked the prosecutor insensible, and then robbed him, the robbery was complete: *Rex v. Lapier*, 1 Leach, 320; S. C., Fost. 128; *Rex v. Hawkins*, 3 Car. & P. 392. So where the defendant grasped the cravat of the prosecutor, and pressed him against a wall, and in this position took his watch without his knowledge: *Commonwealth v. Snelling*, 4 Bin. 379; see *Mahoney v. People*, 3 Hun, 202. Though the person assaulted delivered with his own hand the thing taken to the assailant, the taking may still be robbery: 1 Hale P. C. 533. And though the delivery of the property seem to be voluntary, yet if it is shown to have been from fear, the offense is still robbery: *Long v. State*, 12 Ga. 293. When the indictment is complete in other respects, it need not allege that the taking was against the will of the prosecutor: *Terry v. State*, 13 Ind. 70; *People v. Shuler*, 28 Cal. 490; *contra*: *Kis v. State*, 11 Humph. 167. But so under the statute of Pennsylvania: *Acker v. Commonwealth*, 94 Pa. St. 284. See also upon this subject the head "Fear," *infra*.

FORCE OR VIOLENCE.—*Must Precede or Accompany Taking.*—When the taking is accomplished by force or violence, the force or violence must pre

cede or accompany the taking: *Shinn v. State*, 64 Ind. 13; S. C., 31 Am. Rep. 110; *People v. McGinty*, 24 Hun, 62; *State v. John*, 5 Jones L. 163; S. C., 69 Am. Dec. 777; *State v. Jenkins*, 36 Mo. 372; *State v. Deal*, 64 N. C. 270; *Rex v. Gnosil*, 1 Car. & P. 304. Knocking a purse out of one's hand and then putting him out of a saloon is not robbery: *People v. McGinty*, *supra*. Where the prisoner picked the person's pocket, whereupon a scuffle ensued, in which the prosecutor was thrown down, it was held to be only larceny: *State v. John*, *supra*.

Nature of Force Necessary.—The force used must be sufficiently violent to overcome the resistance offered, or to prevent resistance through fear: *State v. John*, 5 Jones L. 163; S. C., 69 Am. Dec. 777; *State v. Gorham*, 55 N. H. 152; *McCloskey v. People*, 5 Park. Cr. 299; *People v. McGinty*, 24 Hun, 62; *Jackson v. State*, 69 Ala. 249.

The force used must be a force showing an intent to overpower the party and prevent his resistance; and if the force is used merely to get possession of the property, it is not highway robbery: *Rex v. Gnosil*, 1 Car. & P. 304. If the force used be used only to get possession of the property, or to effect an escape, it is not sufficient: *State v. John*, 5 Jones L. 163; S. C., 69 Am. Dec. 777; *Fanning v. State*, 66 Ga. 167. And it is erroneous to instruct that the felonious taking with violence sufficient to constitute an assault and battery would make out the crime of robbery: *McCloskey v. People*, 5 Park. Cr. 299; but overcoming a resistance, however slight, is sufficient violence: *State v. Gorham*, 55 N. H. 152; and where a struggle ensues for the possession of the property, it is sufficient: *State v. Trexler*, 2 Car. Law. Repos. 90; S. C., 6 Am. Dec. 558; *Jackson v. State*, 69 Ala. 249; *Davies' Case*, 1 Leach, 290; S. C., 2 East P. C. 709; see *infra*, "Snatching is not Robbery."

But although the force used does not overcome resistance, still if it prevents it, not because of any fear on the part of the prosecutor, but because of his surprise, or because he could not have made any resistance had he so desired, the taking is robbery; and this illustrates the rule that fear is not essential to the crime of robbery; the prosecutor need not be even aware of the taking. Thus if force be used, it is not essential that the prosecutor should be either aware or afraid of the taking; as where the prisoner took hold of the prosecutor's cravat, and pressed him against a wall, at the same time taking his watch without his knowledge: this was robbery: *Commonwealth v. Snelling*, 4 Binn. 379. As the complainant was entering a horse-car, an accomplice of the prisoner threw his arms around the complainant's neck, pulled him towards him, and removed a wallet from his pocket: this was robbery: *Maloney v. People*, 3 Hun, 202. Running against a person to divert his attention, and then picking his pocket, is a force sufficient to constitute robbery: *Anonymous*, 1 Lew. C. C. 300. Where several combine to push one rudely about, and while his attention is thus drawn away take his money, it is robbery: *Seymour v. State*, 15 Ind. 288. Surrounding a person so as to render assistance hazardous or vain is a force sufficient to constitute robbery: *Case of Hughes*, 1 Lew. C. C. 301. If a bailiff handcuff a prisoner, under pretense of carrying him to prison with greater safety, and then take his money, this is robbery: *Gascoigne's Case*, 1 Leach, 280.

The fraudulent and felonious taking of property by means of a trick or contrivance, but unaccompanied by violence, does not constitute robbery: *Shinn v. State*, 64 Ind. 13; S. C., 31 Am. Rep. 110; *Huber v. State*, 57 Ind. 341. And even where a struggle for the possession of the property ensues after the thief so obtains the possession of it there is no robbery: *State v. Deal*, 64 N. C. 270.

When the person robbed was intoxicated and insensible at the time, and no violence was shown, the taking was not robbery. The evidence showed that the accused was found standing astride the body of a man who was lying on the ground drunk and unconscious; that he had taken from the pockets of the drunken man a pocket-book and other property, and in so doing had turned the pockets inside out: *Brennon v. State*, 25 Ind. 403. Taking money to desist from a rape is robbery: *Rex v. Blackham*, 2 East P. C. 711. To make robbery a capital offense under the statute of Massachusetts, it is sufficient that the party be armed with a dangerous weapon, with intent to kill or maim the party assaulted by him in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent: *Commonwealth v. Martin*, 17 Mass. 359. The person assaulted may resist with as much force as is necessary to repel the force used against him: *People v. Payne*, 8 Cal. 341; *Johnson v. Patterson*, 14 Conn. 1; see *Curtis v. Hubbard*, 1 Hill (N. Y.), 396; S. C., 4 Id. 334.

Snatching is not Robbery.—The mere sudden taking or snatching the property from the person of another does not constitute robbery: *Rex v. Gray*, 2 East P. C. 708; *Rex v. Steward*, Id. 702; *Rex v. Horner*, Id. 703; *Rex v. Macauley*, 1 Leach, 287; *Rex v. Robin*, Id. 290; *Rex v. Baker*, Id. 290; S. C., 2 East P. C. 703; *Regina v. Walls*, 2 Car. & Kir. 214; *Rex v. Gnosil*, 1 Car. & P. 304; *Jackson v. State*, 69 Ala. 249; *Fanning v. State*, 66 Ga. 167; *Shinn v. State*, 64 Ind. 13; S. C., 31 Am. Rep. 110; *Bonsall v. State*, 35 Ind. 460; *Commonwealth v. Ordway*, 12 Cush. 270; *State v. Trexler*, 2 Car. Law Repos. 90; S. C., 6 Am. Dec. 558; *McCloskey v. People*, 5 Park. Cr. 299; *People v. Hall*, 6 Id. 642; *People v. McGinty*, 24 Hun, 62; *Johnson v. Commonwealth*, 24 Gratt. 555; *United States v. Simms*, 4 Cranch C. C. 618; *contra*, under statute of Iowa: *State v. Carr*, 43 Iowa, 418. But this offense constitutes stealing from the person under the statutes of some states: *Fanning v. State*, 66 Ga. 167; *Woodard v. State*, 9 Tex. App. 412; *Johnson v. Commonwealth*, 24 Gratt. 555; *Regina v. Walls*, 2 Car. & Kir. 214. The reason is that the force used is not sufficient to overcome or prevent any resistance or to put the owner in fear, nor can it be inferred that there was an intention of taking violently in the face of a resisting force: See 1 Whart. Crim. L., sec. 854. But though the thing be snatched, if there is in addition a violence used upon the person, or a putting in fear, it will be robbery. Thus, if a struggle immediately ensue to keep possession of the property, and the thief overcome the resistance, then the violence used is that violence sufficient to constitute this crime: See *Jackson v. State*, 69 Ala. 249; *State v. Trexler*, 2 Car. Law Repos. 90; S. C., 6 Am. Dec. 558; *Rex v. Horner*, 2 East P. C. 703; *Chick's Case*, Id. In *Davies' Case*, 1 Leach, 290, S. C., 2 East P. C. 709, the prisoner snatched at a sword hanging at a gentleman's side, but the gentleman, perceiving the intentions of the thief, instantly laid tight hold of the scabbard, whereupon a struggle ensued, which ended in the sword being taken away. The crime was robbery. But if the struggle occurs after the taking, and the force used is only to effect an escape, the sudden taking does not become robbery: See *State v. John*, 5 Jones L. 163; S. C., 69 Am. Dec. 777. Where a thief slipped his hand into a lady's pocket and got his finger caught therein, and she felt the hand, and turning, after he had secured her purse, saw him looking unconcernedly at the houses near by, and caught him by the coat, which he left with her in his struggle to escape, it was held that the crime was larceny from the person, though the lady's pocket was torn when the thief extracted his hand: *Fanning v. State*, 66 Ga. 167.

But if there is any violence done to the person robbed at the time of the

snatching, the taking is robbery: *State v. Trezler*, 2 Car. Law Repos. 90; S. C., 5 Am. Dec. 558. The prisoner snatched a watch-chain with such violence as to tear it away from the watch and from the button-hole. The owner tried to recover the chain, but failed, the defendant striking him, and making his escape. This was robbery: *State v. Broderick*, 59 Mo. 318. Snatching a diamond pin from the head-dress of a lady, with such force as to remove the pin with a part of the hair, is sufficient violence to constitute robbery: *Rex v. Moore*, 1 Leach, 335. To force an ear-ring from the ear of a lady is sufficient violence to constitute robbery, and to remove it from the ear into her hair a sufficient carrying away: *Rex v. Lapier*, Id. 320. The watch was fastened by a steel chain, which was worn about the prosecutor's neck, and in taking the watch the prisoner used force sufficient to break this chain. This was robbery: *Rex v. Mason*, Russ. & Ry. 419. The principal case is also authority to this effect. In that case a silk ribbon watch-guard was broken. But in *Brennan v. State*, 25 Ind. 403, *Mason's Case*, Russ. & Ry. 418, and the principal case are cited, and said to go to the "verge of the law" in thus holding. The case of *United States v. Simms*, 4 Cranch C. C. 618, is, however, directly to the contrary. There a watch was snatched and a ribbon guard broken, but it was held no robbery.

Whenever resistance is prevented by threats of actual violence, creating a reasonable apprehension of it, the snatching becomes robbery: *Jackson v. State*, 69 Ala. 249. But if the putting in fear is done after the taking, it is not robbery: *Rex v. Harman*, 2 East P. C. 736. And if resistance be prevented by the use of actual violence, the snatching becomes robbery: *Commonwealth v. Snelling*, 4 Binn. 379; *Maloney v. People*, 3 Hun, 202.

FEAR.—See *supra*, "Against Will of Prosecutor." Though no violence is used, robbery may be committed if the taking is accomplished by means of fear inspired in the person robbed: See cases *supra* at the beginning of this note, cited to the effect that robbery may be committed by force or fear. But an instruction authorizing a verdict upon proof of a robbery by force or violence, though the indictment alleged merely a putting in fear, and this charge was not proved, is erroneous: *Glass v. Commonwealth*, 6 Bush, 436. This fear may be of three kinds: fear of injury to the person, to the property, or to the character: *Long v. State*, 12 Ga. 293; *Rex v. Reane*, 2 Leach, 619.

Fear must Precede Taking, but may Continue.—The fear must be present and immediate to the person robbed at the time of the taking, and not follow it or be inspired after the taking is complete: *State v. Jenkins*, 36 Mo. 372; *Clary v. State*, 33 Ark. 561; *Rex v. Harman*, 2 East P. C. 736; *Rex v. Gray*, Id. 708. Where the prisoner picked the pocket of the prosecutor by stealth, and when the property was demanded back, menaced the prosecutor and then went away with the property, this was larceny only: *Rex v. Harman*, Id. 736.

The fear once inspired may continue so as to make a subsequent taking robbery. "If A assaults B and bids him deliver his purse, and B delivers it accordingly, this is a taking, and so it is if B refuse, and then A prays him to give or lend him money, which B doth accordingly, this is robbery, for B doth it under the same fear; so it is if B throw his purse or cloak in a bush and A takes it up and carries it away; so, if B flying from the thief lets fall his hat and the thief take it and carry it away, for all is the effect of the same fear:" 1 Hale P. C. 533. "If thieves come to rob A, and finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath, for the fear continued, though

the oath bound him not:" *Id.* 532. The property need not be delivered at the same time with the assault, or the putting in fear, but if it is delivered afterwards, and whilst the fear or apprehension of danger continues, the whole transaction is one transaction, and may be robbery: *Long v. State*, 12 Ga. 293.

What Fear Sufficient.—The menace must be such as to excite a reasonable apprehension of danger: 2 Bishop Crim. L., sec. 1170; 2 East P. C. 713; 1 Hawk. P. C. 214, sec. 8; *Long v. State*, 12 Ga. 293. If the transaction be attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger, and to induce a man to part with his property for the safety of his person, he is put in fear. Actual fear need not be strictly and precisely proved, for the law in *odium spoliatoris* will presume fear where there appears to be just ground for it: *Long v. State, supra.* An instruction that it is not necessary that the means used to put a party in fear should be such as to put in fear a man used to the ways of the world is correct: *State v. Carr*, 43 Iowa, 418. A fear of personal violence is sufficient though the prosecutor did not at the time know of the taking: *Commonwealth v. Snelling*, 4 Binn. 379. Where a lawful pretense is used, the taking is still robbery, as where cheeses carried along the highway were seized on pretense of a want of a permit when none was in fact necessary: *Merriman v. Hundred of Chippenham*, 2 East P. C. 709.

Fear may be Proved by Prosecutor.—The prosecutor may testify to his belief that he would be shot if he did not surrender the property, though generally a witness cannot state his opinion or belief: *Dill v. State*, 6 Tex. App. 113; *Long v. State*, 12 Ga. 293.

Fear of Injury to Property—Extortion by Mob.—A giving of money or goods upon a demand by one of a mob, accompanied with a threat to tear down or burn down the owner's house, or to lay waste his premises, is robbery: *Rex v. Simons*, 2 East P. C. 731; *Rex v. Taplin*, *Id.* 712; *Rex v. Brown*, *Id.* 731. In *Rex v. Spencer*, *Id.* 712, the prosecutor, under fear of mob violence, sold the mob corn worth thirty-eight shillings for thirty shillings. In *Rex v. Astley*, *Id.* 729, the threat was to bring a mob from a neighboring town, and there was no fear of personal violence, but only for the safety of the house. *Rex v. Winkworth*, 4 Car. & P. 444, was an indictment for robbery. In that case the prisoners went with a mob to the prosecutor's house, and one of the mob went up to the prosecutor and very civilly, and as the prosecutor then believed with good intention, advised him to give them something to get rid of them and prevent mischief, and he in consequence of this gave them money, and it was permissible to show *animus furandi*, by evidence of similar demands for money at other places on the same day by the same mob.

Fear of Injury to Character by Threatened Charge of Sodomy.—It is well settled in England, and perhaps in America, that where one succeeds in extorting money from another by threatening to charge him with or prosecute him for sodomy, this is robbery, though there be no other fear than that of the loss of character: *Rex v. Egerton*, Russ. & Ry. 375; *Rex v. Cannon*, *Id.* 146; *Rex v. Donally*, 1 Leach, 193; S. C., 2 East P. C. 715; *Rex v. Hickman*, 1 Leach, 278; *Rex v. Harrold*, 2 East P. C. 715; *Rex v. Jones*, 1 Leach, 139; S. C., 2 East P. C. 714; *Rex v. Elmstead*, 2 Russ. Cr. 128; *People v. McDaniels*, 1 Park. Cr. 198 (sexual connection with a mare); *Long v. State*, 12 Ga. 293; *Britt v. State*, 7 Humph. 45. The rule applies to a threatened charge of sodomy alone, for it is the loathsomeness of this particular offense that causes one upon a mere threat to prosecute him therefor to yield up his money or goods: *Long v. State*, 12 Ga. 293; see also *People v. McDaniels*, 1 Park. Cr. 198; *Britt v. State*, 7 Humph.

45. Though this is well established by the English law, and is recognized in this country, it is rather of historical than practical interest. Such a case would seldom arise at the present day, when the law against blackmailing is so severe, and the system of cross-examination so perfected, that the criminal would have little hope, and the threatened person little fear of a conviction upon such a charge. Furthermore, no man with a standing in society sufficiently prominent to tempt the would-be extortioner fears at the present day injury to his reputation from such a charge heralded from such a source. It is from these and other reasons perhaps that the cases upon this subject are not of late occurrence. Mr. Bishop regards this doctrine as an "excrescence upon the law." And it does seem unfounded in principle, though hardly more so than the cases on mob violence. The distinguishing feature of robbery is that it affects the corporeal person of the party robbed. The taking must be from the person, actually or constructively. And it is consummated by means of personal violence or the fear of personal violence. Now, it is a useless subtilty to strain for an analogy between these two excepted instances and fear of personal violence. They are to be regarded in principle as exceptions or additions to the law of robbery, but at least that, in view of the numerous authorities supporting them. Concerning the latter exception relative to the threatened charge of sodomy, which is based upon the horrible nature of the crime, it may be further remarked that if it be regarded as law, it should not be confined to this charge, since equally or more loathsome acts are imaginable.

The crime will not, however, be robbery when the property is parted with upon a threatened charge of sodomy, not from fear of loss of character, but for the purpose of prosecuting the offender. The fear is essential to the crime: *Rex v. Fuller*, Russ. & Ry. 408. So where upon the trial the prosecutor swore that he was not in fear of violence to his person or injury to his character, the prisoner could not be convicted: *Rex v. Keane*, 2 Leach, 619; S. C., 2 East P. C. 734. Obtaining money from a woman upon a threat to accuse her husband of an unnatural crime is not robbery: *Rex v. Edward*, 1 Moo. & R. 257; S. C., 5 Car. & P. 518.

The guilt or innocence of the party threatened to be charged is immaterial. In either case, it is robbery to extort money in this way, whether the party robbed be innocent or guilty of the crime: *Long v. State*, 12 Ga. 293; *Rex v. Gardner*, 1 Car. & P. 479; *Regina v. Cracknell*, 10 Cox C. C. 408; *Regina v. Richards*, 11 Id. 43. But in the last case it is said that the guilt is material in considering the question whether the intention of the prisoner was to extort money or merely to compound a felony. It is not necessary that the threat should be in unequivocal language, if understood by the prosecutor as a threat: *People v. McDaniels*, 1 Park. Cr. 198. Notwithstanding the statute 1 Vict., c. 87, sec. 3, it is still robbery to extort money by threatening a charge of sodomy: *Regina v. Stringer*, 2 Moo. C. C. 261, overruling *Regina v. Henry*, Id. 118.

Other Threats of Legal Process and Prosecution.—The threatened charge of sodomy is the only threat of prosecution for a crime from which can be inferred the fear necessary to constitute the crime of robbery: *Long v. State*, 12 Ga. 293; *Knewland's Case*, 2 Leach, 721; S. C., 2 East P. C. 732; *Rex v. Newton*, Car. Crim. L. 285; *Regina v. Henry*, 2 Moo. C. C. 118. Threatening criminal prosecution for passing counterfeit money is not sufficient to make the extortion robbery: *Britt v. State*, 7 Hump. 45. So of a threat to arrest: *Knewland's Case*, 2 Leach, 721; S. C., 2 East P. C. 732; *Williams v. State*, 12 Tex. App. 240. If one against whom a crime has been committed with or without a

warrant arrest the offender, and receive money or property without violence under an agreement not to prosecute, that is not robbery: *Long v. State*, 12 Ga. 293. But if threats of prosecution for any other crime than sodomy are accompanied with force, actual or constructive, the offense is robbery, whether the party be guilty or not of the crime charged. The guilt of the party robbed is no defense to the robbery: *Id.* To extort money by means of a threat to indict the person for perjury is indictable as a trespass at the common law: *Regina v. Woodward*, 11 Mod. 137.

In some states, obtaining money by threats is made a substantive offense: *Commonwealth v. Murphy*, 12 Allen, 449; *State v. Vaughan*, 1 Bay, 282; *Regina v. Robertson*, Leigh & C. 483. It is not necessary that an indictment under the statute for attempting to extort money by threats should set out with technical accuracy the crime or offense with which the defendant is alleged to have threatened to accuse another person. A false statement that a warrant has been issued to arrest a person for a crime, which will be served unless money is paid to stay the process, is a threat to accuse him of a crime within the statute: *Commonwealth v. Murphy*, 12 Allen, 449. Threatening to procure witnesses to support a charge already made is a different thing from threatening to accuse of an indictable offense which is made a crime by statute: *Gill's Case*, 1 Lew. C. C. 305.

ANIMUS FURANDI IS NECESSARY.—The final constituent element of robbery is the *animus furandi*. The taking must be with an intent to appropriate the property likewise as in larceny: *People v. Keefer*, 2 West Coast Rep. 878 (Cal.); *Long v. State*, 12 Ga. 293; *State v. Hollyway*, 41 Iowa, 200; *Ward v. Commonwealth*, 14 Bush, 233; *Murphy v. People*, 3 Hun, 114; S. C., 5 Thomp. & C. 302; *Hope v. People*, 83 N. Y. 418; S. C., 38 Am. Rep. 460; *State v. Sowls*, Phill. L. 151; *State v. Curtis*, 71 N. C. 56; *Hammond v. State*, 3 Coldw. 129; *Jordan v. Commonwealth*, 25 Gratt. 943, 948; *United States v. Durkee*, McAll. 196. Thus where one commits a mere battery, with no intent to steal, he is not guilty of robbery: *Murphy v. People*, 3 Hun, 114; S. C., 5 Thomp. & C. 302; *State v. Curtis*, 71 N. C. 56; see *Jordan v. Commonwealth*, 25 Gratt. 943, 948. If a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them return and steal his money, etc., that one only can be convicted of robbery, since all did not act *animus furandi*: *Rex v. Hawkins*, 3 Car. & P. 392; S. C., Fost. 128. The prisoner need not have intended to appropriate the pistol to his own use; if he intended to deprive the prosecutor of his property, that is sufficient, although he also intended to prevent the pistol being used against him: *Jordan v. Commonwealth*, 25 Gratt. 943, 948. But see *United States v. Durkee*, McAll. 196. The taking of bank keys may be robbery, though the keys were used only for the purpose of entering the bank: *Hope v. People*, 83 N. Y. 418; S. C., 38 Am. Rep. 460. The use afterwards made of the thing taken is no defense: *Id.* Taking money to desist from rape is robbery, although this was not within the original contemplation of the assailant: *Rex v. Blackham*, 2 East P. C. 711.

Evidence.—The form in which the demand for money is made is immaterial. The prisoner may say, "Give me your money," or, "Lend me your money," or, "Make me a present of your money," and it is equivalent to a positive order or demand: *Rex v. Donally*, 1 Leach, 193, 196; S. C., 2 East P. C. 715. The fact of robbery being proved, the *animus furandi* is inferred from the appropriation of the property: *Long v. State*, 12 Ga. 293; *Jordan v. Commonwealth*, 25 Gratt. 943, 948. That the thief was masked or disguised at the time of the taking shows *animus furandi*, and artifice in concealing

the fact that the taker has the property shows a felonious intent: *State v. Deal*, 64 N. C. 270. It was permissible to show the *animus furandi* of members of a mob who obtained money by threats of mob violence by evidence of similar demands for money at other places on the same day by the same mob: *Rex v. Winkworth*, 4 Car. & P. 444.

Question for Jury.—Whether or not the prisoner took the property with intent to steal it is a question for the jury, under appropriate instructions: *Jordan v. Commonwealth*, 25 Gratt. 943, 948; *State v. Souls*, Phill. L. 151; *People v. Hall*, 6 Park. Cr. 642; *Johnson v. Commonwealth*, 24 Gratt. 555, 558. The jury may consider the defendant's character for honesty: *McQueen v. State*, 82 Ind. 72.

Return of Property does not Purge Offense: 1 Hale P. C. 533. The crime is complete though the prisoner after taking the purse gave it back, telling the prosecutor to give him the contents, but is apprehended before the money is delivered to him: *Peat's Case*, 1 Leach, 228.

Taking under Belief of Ownership is not Robbery: See "Ownership," *supra*. When the prisoner takes the property under a *bona fide* impression that the property belongs to him, he commits no robbery, for there is no *animus furandi*: *Rex v. Hall*, 3 Car. & P. 409; *Long v. State*, 12 Ga. 293; *Brown v. State*, 28 Ark. 126 (where the taking was in the presence of others). A creditor who compels payment of his debt by the use of violence is not guilty of robbery. There is no *animus furandi*: *Regina v. Hemmings*, 4 F. & F. 50; *State v. Hollyway*, 41 Iowa, 200; S. C., 20 Am. Rep. 586. This is a statutory offense in Iowa: *State v. Hollyway*, *supra*.

Taking by Belligerents.—A taking from a non-combatant, in conformity with a military order and authority, *Commonwealth v. Holland*, 1 Duv. 182, or from one of the enemy, *Hammond v. State*, 3 Coldw. 129, is not robbery, since the act is belligerent and lacks the *animus furandi*: See *United States v. Durkee*, McAll. 196. One who, believing himself to be acting under the orders of a military officer, forcibly took a sword from another, solely to disarm him, is not guilty of robbery: *State v. Souls*, Phill. L. 151; see *United States v. Durkee*, *supra*.

Taking by Wife under Constraint of Husband.—Whatever of a criminal nature a wife does under constraint of her husband she is not legally guilty of; and the mere presence of the husband at the time of the commission of the act raises the presumption that it was done under his constraint. Treason and murder form an exception to this rule, and some add robbery. The reason usually assigned for excepting these offenses from the rule is the enormity of the offenses. But Mr. Bishop considers this reason unsatisfactory in principle, and thinks that these offenses should be exceptions merely to the rule that the husband's coercion is presumed from his presence, because they are offenses "of so much malignity as to render it improbable a wife would be constrained by her husband, without the separate operation of her own will, into their commission." And it is inferable that his opinion is that if actual constraint can be proved, then the wife should not be held answerable even for these crimes: See 1 Bishop Crim. L., secs. 358-361. But at all events, it is doubtful whether robbery should be included among these excepted crimes: *Id.* If a wife acts voluntarily throughout, and takes part in the robbery committed by her husband, she is guilty of the same crime: *Miller v. State*, 25 Wis. 384. Where a wife participated with her husband in a robbery, throttled the victim and told him to keep still, while her husband rifled his pockets, she is guilty, and did not act under her husband's coercion: *People v. Wright*, 38 Mich. 744.

INDICTMENT FOR ROBBERY.—Under the appropriate heads above, decisions as to what the indictment should contain will be found. There are, however, additional cases which are here cited.

An indictment charging a taking from the person, "feloniously and violently," sufficiently alleges a putting in fear: *Commonwealth v. Humphries*, 7 Mass. 242; *State v. Cowen*, 7 Ired. L. 239; 2 East P. C. 783; see *State v. Swafford*, 3 Lea, 162. "But it is safer to allege that the prosecutor was put in fear, and that the act was done forcibly, since in this case either of these allegations can be discharged as surplusage:" 1 Whart. Crim. L., sec. 857; see also *Collins v. People*, 39 Ill. 233; *Anderson v. State*, 28 Ind. 22; but see *Glass v. Commonwealth*, 6 Bush, 436; also *Chapell v. State*, 52 Ala. 539. Allegations of "against the will" and "from the person" are necessary: See Whart. Crim. Pl. & Pr., sec. 267; and *supra*, under these heads. These allegations are not necessary under the Pennsylvania statute, when the word "rob" is used: *Acker v. Commonwealth*, 94 Pa. St. 284. In Iowa the assault need not be alleged in express terms: *State v. Brewer*, 53 Iowa, 735; *State v. Kegan*, 62 Id. 106. Under an indictment charging robbery by threats of future violence, threats of present violence are admissible: *State v. Howerton*, 58 Mo. 581. If the description of the defense is substantially in the words of the statute, it is sufficient: *State v. Barnett*, 3 Kan. 250; *Taylor v. Commonwealth*, 3 Bush, 508. The words of the statute should be followed: *Commonwealth v. Tanner*, 5 Id. 316. But indictments substantially conforming to common-law precedents are good in substance, under the penal code in Texas: *Burns v. State*, 12 Tex. 269.

The property may be described the same as in a prosecution for larceny; no greater particularity is required: *McEntee v. State*, 24 Wis. 43; *Brennan v. State*, 25 Ind. 403; see *Turner v. State*, 1 Ohio St. 422; *Wesley v. State*, 61 Ala. 282. An indictment should state distinctly the kind of money taken: *Wesley v. State*, *supra*. "Thirty dollars in greenbacks" was sufficient, though "greenbacks" is a slang word: Id. "One piece of gold coin of American coinage of the value of five dollars" was sufficient: *Terry v. State*, 13 Ind. 70. Where the statute prescribes that it is sufficient to describe money simply as money, it is sufficient to describe the money as "the sum of one hundred dollars in paper currency of the United States:" *State v. Carro*, 26 La. Ann. 377. But "ten dollars in money of United States currency" is, in the absence of such a statute, too indefinite, since currency may be either coin, bank notes, or government notes: *Crocker v. State*, 47 Ala. 53. An insufficient description of money alleged to have been taken is cured if the indictment recites that a more particular description of the money is unknown to the grand jury: *Territory v. Bell*, 5 West Coast Rep. 702 (Mont.); *McQueen v. State*, 82 Ind. 72. The kind of money alleged must be proved: *Johnson v. Commonwealth*, 24 Gratt. 555. But where the indictment charged larceny of treasury notes, it was held sufficient to prove that the property was greenbacks: *Hickey v. State*, 23 Ind. 21. As to value, see "Ownership," *supra*.

The name of the person robbed, if known, should be stated with the same precision as in larceny: *Smedly v. State*, 30 Tex. 214; *Commonwealth v. Clifford*, 8 Cush. 216; *Crews v. State*, 3 Coldw. 350; *People v. Vice*, 21 Cal. 344; *People v. Jones*, 53 Id. 58; *Parker v. State*, 9 Tex. App. 351. But a mistake in the name of the person robbed is not material, unless the prisoner has been prejudiced thereby: *State v. Carr*, 43 Iowa, 418. An indictment charging robbery committed in the public highway is sufficient without specifying the termini of the highway: *State v. Burke*, 73 N. C. 83. Under such an indictment, evidence cannot be introduced of a robbery near the highway: *State v.*

Cowan, 7 Ired. L. 239. But an indictment charging the common-law offense of highway robbery to have been committed "near the highway" is good: *State v. Anthony*, Id. 234; *State v. Wilson*, 67 N. C. 456; see *State v. Howerton*, 59 Mo. 91.

CONVICTION OF LARCENY AND OTHER INCLUDED OFFENSES UNDER INDICTMENT FOR ROBBERY.—Robbery includes larceny, larceny from the person, and assault and battery; and under an indictment for robbery, which, as we have seen, must allege facts constituting larceny, and often facts constituting an assault, the prisoner may be convicted of larceny: *People v. Nelson*, 56 Cal. 77; *People v. Jones*, 53 Cal. 58; *McEntee v. State*, 24 Wis. 43; *State v. Jenkins*, 36 Mo. 372; *Regina v. McGrath*, L. R. 1 C. C. 210; larceny from the person: *Murphy v. People*, 3 Hun, 114; S. C., 5 Thomp. & C. 302; grand larceny: *Allen v. State*, 58 Ala. 98; *Hickey v. State*, 23 Ind. 21; see *State v. Howard*, 19 Kan. 507; common assault: *Regina v. Birch*, 1 Den. C. C. 185; *Howard v. State*, 25 Ohio St. 399; or assault and battery: *Murphy v. People*, 3 Hun, 114; S. C., 5 Thomp. & C. 302. But robbery does not necessarily include grand larceny; and a verdict of robbery on insufficient evidence does not authorize the court, on motion for new trial, to sentence the prisoner for grand larceny: *State v. Howard*, 19 Kan. 507. A conviction of grand larceny bars a subsequent prosecution for robbery: *Hickey v. State*, 23 Ind. 21; see also note on *autrefois acquit* and *convict*, *Roberts v. State*, 58 Am. Dec. 536 et seq. The offense of assault and battery with intent to rob is not merged in the crime of robbery, but the prisoner may be prosecuted for either: *Hamilton v. State*, 36 Ind. 280. No conviction of robbery in the second degree, which is when the fear is of a future injury, can be had under an indictment for robbery in the first degree, in Missouri: *State v. Jenkins*, 36 Mo. 372.

THE PRINCIPAL CASE IS CITED in *Brennan v. State*, 25 Ind. 404, which cites the principal case, and *Mason's Case*, Russ. & Ry. 418, as going to the verge of the law in holding that the breaking of a watch-guard or chain in taking a watch constitutes sufficient force to make the offense robbery.

CASES IN EQUITY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

GODBOLD v. LAMBERT.

[8 RICHARDSON'S EQUITY, 155.]

SALE UNDER DORMANT EXECUTION IS NULL AND VOID.

SURETY WHO HAS PAID DEBT IS CREDITOR OF PRINCIPAL, and relief may be afforded him as such against a fraudulent conveyance by the principal.

AVERMENT OF IGNORANCE OF FRAUD UNTIL TIME WITHIN STATUTORY LIMITATION made by plaintiff in bill to set aside fraudulent conveyance casts the burden upon the defendant to prove the contrary.

AVERMENT OF IGNORANCE OF FRAUD UNTIL TIME WITHIN STATUTORY LIMITATION is sufficient if made in a manner sufficiently explicit to enable the defendant to meet the issue tendered.

REGISTRY OF DEED DOES NOT GIVE NOTICE OF FRAUD IN ITS EXECUTION.

BILL to set aside alleged fraudulent conveyance, and to subject the land to the payment of a debt. The complainant was a surety upon a note of the defendant Lambert. The surety took up the note, and obtained a confession of indebtedness, on which judgment was signed on the ninth, and execution lodged on the tenth of March, 1841. The averment of ignorance of the fraud till a time within the statutory period was to the effect that it was within four years that the complainant discovered the fraud perpetrated upon him, to wit, he discovered the deed to Sessions in October, 1852, and so on, setting out the dates when he discovered the deeds involved in this cause. The chancellor held that this averment was insufficient, since he did not set out the facts constituting the fraud, accompanied with an allegation that those facts did not come to his knowledge until within four years. And the chancellor also held that the

statute ran against him from the date of the registry of the deeds. The bill was ordered to be dismissed, and the complainant appealed. The remaining facts appear from the opinion.

Evans, for the appellant.

Phillips, contra.

By Court, DARGAN, Chancellor. It is manifest that James Lambert, one of the defendants, has committed a fraud upon the plaintiff, who was his surety, and whom he left to pay his debt, although he had means enough to pay his own debts. After the surety had paid the debt, the defendant Lambert gave him a confession of judgment on the same, upon which judgment was entered up and execution was lodged. The defendant Lambert, having bought land from one Thompson (about six hundred and three acres), and fraudulently, and with the view of defeating his creditors, caused titles to be made by Thompson to his three infant children (who are also parties to this suit); the deed of Thompson bearing date the thirteenth of October, 1840.

Under a judgment and execution against Lambert, Gowan, the sheriff of Horry, sold the land on the fourth of October, 1841, to Sessions, for ten dollars and fifty cents, and conveyed the land to Sessions by deed bearing date the tenth of October, 1841.

In the mean time, by reimbursing Sessions for the purchase money, Lambert procured him to reconvey the land to his children; which was done by deed, dated the sixteenth of February, 1846.

The plaintiff's judgment remaining unsatisfied, by virtue of an execution under the same, the sheriff again levied on and sold the land as Lambert's property. It was bid off by the plaintiff to this suit for ten dollars, and conveyed to him by deed accordingly.

The plaintiff has instituted a suit at law for the land, but deeming his success doubtful, he has come into this court. His bill was filed the tenth of January, 1855. The bill prays that the deeds to the children may be set aside as fraudulent against the creditors of the father. The plaintiff asks that this court will grant him aid auxiliary to his suit at law, or grant him plenary relief in this court.

Whatever view may be taken of the case, this court can grant him no aid in his suit at law. The execution, by virtue of which the land was sold to Godbold, was dormant. It had been re-

the purchaser bond and personal security, and a mortgage of the premises.

DUNKIN and WARDLAW, chancellors, concurred.

Decree reversed.

STATUTE OF LIMITATIONS MAY BE RELIED ON BY FRAUDULENT GRANTEE, where grantor's creditor seeks to set aside the deed: *McDowell v. Goldsmith*, 61 Am. Dec. 305, and note 317.

BURDEN OF PROOF, WHEN PARTY SEEKS TO AVOID STATUTE OF LIMITATIONS on the ground that he had no notice of the fraud complained of, is upon the defendant: *Shannon v. White*, 60 Am. Dec. 115, note 121.

SURETY IS CREDITOR, AND MAY IMPEACH CONVEYANCE AS FRAUDULENT: *Choteau v. Jones*, 50 Am. Dec. 460, note 469; note to *Greer v. Wright*, 52 Id. 117, 118; *Hutchison v. Kelly*, 39 Id. 250; but see *Williams v. Tipton*, 42 Id. 420.

REGISTRY OF DEED IS ONLY IMPLIED NOTICE OF ITS CONTENTS, and not of any fraud that may be perpetrated in its execution: *Martin v. Smith*, 4 Nat. Bank. Reg. 287; S. C., 1 Dill. 98, citing the principal case. It is notice only of what appears on the face of the deed: *Shepherd v. Burkhalter*, 68 Am. Dec. 523, note 528.

THE PRINCIPAL CASE IS CITED in *Trask v. Green*, 9 Mich. 370, to the point that in some states, where judgments constitute a lien on real estate, it has been held that a creditor has by his judgment a lien on the equitable estate of the debtor, in like manner as at law on his legal estate.

SIMS v. McLURE.

[8 RICHARDSON'S EQUITY, 286.]

SUIT TO SET ASIDE CONTRACT OF LUNATIC, IN SOUTH CAROLINA, may be brought in the name of the committee of the lunatic, but it is better to make the lunatic a party, for in this state the maxim that one cannot stultify himself is not recognized.

EQUITY SETS ASIDE ACTS OF LUNATICS ON GROUND that fraud has been practiced upon them.

BILL TO SET ASIDE CONTRACTS OF LUNATIC should state facts impeaching each contract sought to be avoided.

LUNATIC IS BOUND BY CONTRACTS MADE BEFORE INQUISITION OF LUNACY, where no undue advantage has been taken of him, and where evidences of his mental unsoundness were not so manifest as necessarily to give notice of his incompetency to contract.

CONTRACTS OF LUNATICS MADE AFTER TIME AT WHICH INQUISITION FINDS UNSOUNDNESS TO BEGIN are *prima facie* void; but the inquisition is not conclusive evidence of mental unsoundness.

BILL in equity. The opinion of the chancellor states the case. The complainant appealed.

Bobo, for the appellant.

Dawkins, contra.

By Court, WARDLAW, Chancellor. By an inquisition executed under the order of this court on January 26, 1853, and confirmed April 12, 1853, by a chancellor, it was found that Thaddens C. Sims "is of unsound mind, and has been so from his infancy, and incapable of the government of himself and estate." The plaintiff was appointed committee of the said Thaddens, and on July 23, 1853, he, as committee, filed this bill to set aside sales of certain slaves, made by said Thaddens, and certain judgments confessed by him before the inquisition.

The practice of instituting such a suit in the name of the committee only is sustained by high authority: Story's Eq. Pl., sec. 64; *Ortley v. Messere*, 7 Johns. Ch. 139. But where, as in this state, the maxim of the common law, that one cannot multiply himself, is not recognized, it is certainly better to follow the general rule of pleading to make all parties to the suit who are materially interested in the object of it, and not to litigate and adjudge concerning the estate of any person, even a lunatic, who is not before the court. The pleading of the plaintiff is liable to other and more serious objections. He seeks redress in one bill against many defendants, for various representations, in which the defendants have no community of interest or action. Worse still, he states no specific case against any one of the defendants, and endeavors by vague averments to implicate all. A brief summary of the bill is, that Thaddens was regarded by his family and friends as of unsound mind, without adequate knowledge of the value of property, and liable to be overreached; that he was entitled by succession to seventeen negroes and several thousand dollars; and that, on his coming of age in 1850, this property was put into his unrestricted possession by his guardian, J. J. Pratt, after a settlement with him; that of this estate nothing remains in his hands except a tract of land worth eight hundred or one thousand dollars, three negroes, and some other chattels of inconsiderable value, subject to the lien of judgments against him to about the sum of one thousand six hundred dollars; that the other negroes have passed into the hands of sundry persons for very inadequate consideration, paid in things of little value to him; and that of these negroes, Peyton Hunter has two, Margaret and Taylor; William T. Wilkins has two, Irene and Margaret; William Robbs has three, Mose, Jim, and Trezevant; McLure and Wilson have Eliza; and William Savage has Frank; that of the debts in judgment, a list of which is exhibited, some were contracted while Thaddens was a minor, and many others were without any adequate consideration of any

mind, under mere pretenses, by which his imbecility was overreached; although some of them may have been for necessities, and entitled to payment. And the prayer of the bill is that the defendants be required to make a full exhibit of their dealings with Thaddeus, with dates, items, and proofs of fairness, and come to a full account with plaintiff, and in the mean time be enjoined; and that the unjust contracts be set aside, and the property acquired under them be delivered to plaintiff, and that he be allowed to sell so much of it as is necessary, and pay the creditors whatever is fairly due. The bill further alleges that plaintiff applied to some of the creditors for statements of their claims against his ward (of which there is no proof except as to Hunter), and that in the only case in which his request was complied with, Hunter's, he is satisfied a portion of the claim is not allowable. All of these allegations are of a sweeping and indefinite character, and not pointed individually to persons or transactions. The grounds on which courts of equity interfere to set aside the sales or other solemn acts of persons of unsound or weak minds is that fraud has been practiced on them: Story's Eq. Jur., sec. 227. A plaintiff seeking the aid of the court in such case should state in his bill facts and circumstances impeaching each particular contract sought to be avoided.

It may be that all contracts of persons *non compos mentis*, made after the time at which the inquisition finds the unsoundness to begin, are *prima facie* void, that is, voidable; but the inquisition is not conclusive evidence of the fact of unsoundness, and may be gainsaid by a party in interest without formal traverse. Indeed, a fair contract made with a lunatic by a third person, without notice of the lunacy, will not be disturbed: *Baxter v. Earl of Portsmouth*, 5 Barn. & Cress. 170; *Niell v. Morley*, 9 Ves. 478; *Beavan v. McDonnell*, 9 Exch. 309; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Keys v. Norris*, 6 Id. 388.

The bill in this case does not allege that the defendants, at the time of their several contracts, had any notice of the unsoundness of mind of Thaddeus Sims; and the defendants not only deny notice of this fact, but altogether dispute the unsoundness. I shall not repeat in detail the evidence given as to unsoundness; but a brief summary of it is, that Thaddeus learned little or nothing at school, that he could not count well, and that he seemed to know little of the denominations of bank bills. On the other hand, that upon attaining full age his guardian, a most prudent and respectable man, settled with him and delivered to him his property in unrestricted posses-

sion; and that afterwards, until the inquisition, he managed his own affairs, having dealings, as one competent, with his relations and other persons; that he contracted marriage with the daughter of a respectable family; that he plowed well; that he asked high prices for property he wished to sell; that he was thankful to a witness for keeping him out of a fight; that he sometimes gave sound opinions as to the value of property when his advice was sought; that he recognized his debts, and made arrangements for their payment; that he was able to make short calculations in his head; that he named and knew by name eighteen game-chickens raised for him by a neighbor; and that he played whist well (although I believe cards were invented for the amusement of a crazy French king). It seems impossible to conclude, on this evidence, that his unsoundness was of that manifest character as necessarily to furnish notice of his incompetency to contract to those undertaking to deal with him. I am of opinion that he must be bound by his contracts, where no undue advantage was taken of him, before his friends chose to have a committee appointed for him by the court: *Dodds v. Wilson*, 1 Treadw. 448. His contracts impeached are the sales of certain negroes, and certain debts which have passed into judgments; and they may be considered separately. Of the seventeen slaves alleged to belong to him on maturity, five were accidentally burned to death, three remain in his possession, and three were sold to his father-in-law, Robbs, concerning which a satisfactory adjustment had been made. The title of William Savage to another must be protected by the plea of purchase for valuable consideration without notice, and by the satisfactory proof of the fairness of the original sale of this slave to R. S. Sims. In like manner, the purchase of one by McLure and Wilson, of two by Wilkins, and of two by Hunter seem to have been made *bona fide* for full prices, and must stand. Some of the witnesses expressed the opinion that the price paid by Hunter was moderate, but the inadequacy was not such as of itself to furnish evidence of fraud, and there was no corroborative evidence.

So, too, of the debts contracted by Thaddens; while there was evidence of extravagance and improvidence on the part of himself and wife, there is no proof of overreaching on the part of the creditors. Some of the debts were contracted with the assent of his friends, and others are confessedly fair. In the state of the pleadings and proofs, there is no satisfactory ground for the interference of the court as to these debts.

The evidence, however, makes a pretty strong case as to the satisfaction of the judgment to Wilkins and of the judgment and mortgage to Hunter; and it is proper that further inquiry be made on these points.

It is ordered and decreed that it be referred to the commissioner to inquire and report how much, if anything, remains due upon the judgment and mortgage of Hunter and the judgment of Wilkins against Thaddeus Sims; and that in the mean time Hunter and Wilkins be enjoined from enforcing the collection of these debts.

It is further ordered that in all other particulars the bills be dismissed.

This court sees no sufficient reason for differing from the chancellor. It is therefore ordered that his decree be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, chancellors, concurred.

Appeal dismissed.

INQUISITION OF LUNACY, EFFECT OF, AS EVIDENCE: See *Gibson v. Soper*, 66 Am. Dec. 414; *In re Gangwere's Estate*, 53 Id. 554, and note 561.

PLEA THAT ESTATE OF LUNATIC WHO SUES BY PROCHIEIN AMI is in charge of committee who should bring the suit is a plea in abatement not going to the jurisdiction: *Cook v. Thornhill*, 65 Am. Dec. 63.

VALIDITY OF CONTRACTS WITH LUNATICS: See *Richardson v. Strong*, 55 Am. Dec. 430, and cases cited in the note 431. If the contract was entered into innocently, and no undue advantage has been taken of him, he will be liable on the contract: *Beals v. See*, 49 Id. 573. A contract made by a lunatic with one who had no notice of his condition, and which is in itself fair and just and has become so far executed that the parties cannot be placed in *status quo*, will not be set aside: *May v. Burditt*, 81 Ind. 440, citing the principal case. See also note treating this subject, *Jackson v. King*, 15 Am. Dec. 361-369; see *Seaver v. Phelps*, 22 Id. 372.

MARTIN v. BELL.

[9 RICHARDSON'S EQUITY, 42.]

DEVISE OR BEQUEST TO MARRIED WOMAN MUST BE HELD TO CREATE SEPARATE ESTATE if intent to exclude marital right of husband can be fairly deduced from the language used.

TESTATOR MAY GIVE PROPERTY TO DAUGHTER, and secure it from liability for her husband's debts, notwithstanding the general rule that in testamentary dispositions of property the incidents of the property cannot be taken away.

DEVISE OR BEQUEST TO TESTATOR'S DAUGHTERS declaring that the property "shall in no wise be subject to the debts of their husbands, in no case whatsoever." creates a separate estate in the daughters.

BILL to obtain a construction of a clause in the will of Thomas Bell, which was as follows: "The property, real or personal, that my three daughters, Margaret M., Nancy J., and Martha S., may or do receive by this my will, I hereby settle it on them and the lawful issue of their bodies forever, and I do declare that it shall in no wise be subject to the debts of their husbands, in no case whatsoever." The suit was instituted by W. M. Martin and wife against W. Bell and wife and others, and among the questions submitted was whether the estates of Mrs. Bell and Mrs. Martin were separate estates. The chancellor held that they were separate estates, and the plaintiffs appealed on this ground.

Boylston, for the appellants.

By Court, DUNKIN, Chancellor. In *Wilson v. Bailer*, 8 Strobb. Eq. 260, it is said that a separate estate in the wife is the creature of the court of chancery, and in derogation of the husband's common-law right, and that unless the intention to exclude the husband is clearly expressed, or arises by necessary implication, the marital right is maintained. It is also there said that in order to ascertain whether it was intended to exclude the marital right, it is necessary to analyze the language used in every case. The instrument before us is testamentary. It was a provision of a father in favor of his daughters, two of whom were then unmarried women, and one, Mrs. Bell, married. The difficulty in reconciling the authorities arises from confounding the amplitude of the gift to the donee with an exclusion of the marital right. But if the intent to exclude may be fairly deduced from the language used, it is the duty of the court to give effect to this as to every other lawful intention of the testator. The distinctions are sometimes nice. A gift to a married woman as her own in every respect has been held not to exclude the husband. But in *Ex parte Ray*, 1 Madd. 199, Sir Thomas Plumer held that a gift to "her sole use" gave a separate estate; and chiefly because of the technical character of the expression "sole." The language of this will is, in some respects, technical. "The property, real or personal, that my three daughters may or do receive by this my will, I hereby settle it on them and the lawful issue of their bodies forever." It may be that the word "settle" would only refer to the limitation of the estate. But he proceeds, "and I do declare that it shall in no wise be subject to the debts of their husbands, in no case whatsoever." Certainly it is not competent for a testa-

tor to give property to his son or daughter and take away the incidents of property. But it is not less clear that, according to well-established principles of this court, he may give property to his daughter, and at the same time secure that property from liability for her husband's debts. But this can only be affected by construing the gift to create a separate estate. The intent to exclude the marital right in this case is demonstrated by declaring the property exempt from the principal incident of such right. *Weatherford v. Tate*, 2 Strobb. Eq. 27, has been supposed to conflict with the decision of the circuit chancellor. In that case slaves were bequeathed to the daughters in terms which vested an absolute estate; but to the bequest was added this provision: "No sale made by either of their husbands shall be valid unless by the consent of both or one of my executors, and thus my executors have power to prevent such property being moved off the state." This restriction upon alienation had no reference to the separate enjoyment of the wife, and was not intended to secure it. On the contrary, apparently recognizing the title of the husband, the testator sought only to restrain the exercise of it so far as to prevent the removal of the slaves beyond the limits of the state. To accomplish this, he declared that any sale by the husband must have the sanction of the executors, or one of them, in order to secure its validity. The court could infer no intention to exclude a right from a provision that it shall not be exercised in a particular way. If the testator had provided that no husband of his daughters should require more than nominal wages from the slaves, this restriction could hardly be construed into an intent to secure a separate estate to his daughters, although if effectual, the provision would seriously impair the value of the husband's enjoyment. Such the court appear to have regarded the character of the restriction in *Weatherford v. Tate*, *supra*. "This provision," say the court, "was not a condition, because there was no forfeiture or penalty attached to it, and was utterly inconsistent with the general right of property, and could only operate as a command or order that the property should not be removed or sold, which the party might obey or not at his pleasure."

It is ordered and decreed that the appeal be dismissed.

JOHNSTON, chancellor, concurred.

DARGAN, chancellor, absent at hearing.

Appeal dismissed.

WORDS CREATING SEPARATE ESTATE IN MARRIED WOMAN: See *Bacon v. Holt*, 64 Am. Dec. 585, and cases cited in the note 587; *Sanderson v. Jones*, 53 Id. 217; note to *Smith v. Wells*, 39 Id. 773-778.

TESTATOR'S INTENT TO CREATE SEPARATE ESTATE, WHEN CLEAR, MUST PREVAIL: *Bacon v. Holt*, 64 Am. Dec. 585, and cases cited in the note 587.

BABB v. HARRISON.

[9 RICHARDSON'S EQUITY, 111.]

DISTINCTION BETWEEN WILL AND DEED IS that a will has no operation until the death of the testator, and that a deed must take effect on its execution, and immediately pass the estate or interest given, although it is not essential that this interest shall immediately pass into the possession of the donee.

INSTRUMENT IS NOT DEED IF INTEREST CREATED DO NOT ARISE UNTIL DEATH OF DONOR or some other future time, although it may be denominated a deed by the maker, may have express words of immediate grant, may have sufficient consideration to support a grant, and may be formally delivered.

INSTRUMENT IS WILL, WHATEVER ITS FORM, if the intention of the maker to dispose of his estate after death be sufficiently manifested, and this intention be lawful in itself, and the writing have the statutory formalities.

INSTRUMENT THAT PURPORTS TO CONVEY TITLE AFTER DEATH OF DONOR, or at some future time, is not a deed, though in many respects in the form of one, and may be ineffectual as a will from a lack of the requisite number of witnesses.

BILL in equity. The plaintiffs, Babb and wife, claim a distributive share in certain slaves, unless the title to them is vested in the defendant under the instrument filed as an exhibit. If this instrument is a deed, its due execution and delivery, and consequently the defendant's title, are admitted. But it is claimed that it is testamentary in its nature, and void as a will, since it is attested by only two subscribing witnesses. The instrument in question reads: "Know all men by these presents, that I, Sarah Harrison, of the district and state aforesaid, for and in consideration of the love and affection that I bear towards my son, Cuthbert Harrison, and one dollar to me in hand paid, . . . do give, make, and bequeath . . . unto my said son, Cuthbert Harrison, a certain negro woman, Harriet, and her daughter Ellen, together with their future issue and increase; to have and to hold the said negroes, Harriet and Ellen, and to be at his disposal when and wherever he may think fit or appoint; now, the said negroes, Harriet and Ellen, are to go into the possession of the said Cuthbert Harrison at the time of my

death; and upon the receipt of said negroes, he is hereby required to pay to my grandson [here several grandchildren and relatives are named, to whom he is "required to pay" one hundred dollars each]. Witness my hand and seal this second day of March, A. D. 1853. Sarah Harrison. [L. s.] Made and executed in the presence of us, this 2 March, 1853. Jon'n. Davis, James Aiken. I, Sarah Harrison, of the district and state aforesaid, do other and further make and require my said son, Cuthbert Harrison, in view of the fact that should he, the said Cuthbert Harrison, depart this life, and leaving no lawful issue, I request him, the said Cuthbert Harrison, to make and settle the said negroes, Harriet and Ellen, with their future issue and increase, to my granddaughter, Mary Morgan, wife of James Morgan, and to the heirs of her body forever." Date, signature, and attestation the same as above. The court held this instrument to be testamentary, and void as a will for lack of the requisite number of witnesses. The defendant appealed.

Boylston, for the appellant.

Rion, contra.

By Court, WARDLAW, Chancellor. The tribunal of *dernier ressort* in this state, *Jaggers v. Estes*, 2 Strobb. Eq. 343 [49 Am. Dec. 674], has determined conclusively that a donor by a deed, without naming trustees, may convey an interest in remainder in a chattel after reserving a life estate to himself, if it be apparent from the construction of the whole instrument of gift that a present title was intended to pass irrevocably to the donee, and that the enjoyment only was postponed. Nevertheless, it follows from the definition of a will, a lawful disposal of one's estate to take effect after his death (Carthew, 38; 1 Swinburn on Wills, 25; Co. Lit. 111), that the postponement of enjoyment by the donee until the death of the donor still leads to the conclusion in any controversy, whether an instrument of gift be an irrevocable deed or testamentary, that the instrument is testamentary, unless it may be fairly demonstrated from the text and context that a future interest was presently and irrevocably given. The prominent distinction between a will and a deed is, that a will has no operation until the death of the testator, and that a deed must take effect on its execution, and immediately pass the estate or interest given, although it is not essential that this interest shall immediately pass into the possession of the donee. If the interest created do not arise until the death of the donor, or some other future time, the

instrument cannot be a deed, although it may be so denominated by the maker, may have express words of immediate grant, may have sufficient consideration to support a grant, and may be formally delivered: *Hixon v. Wilhand*, 1 Ch. Cas. 248; *Green v. Proude*, 1 Mod. 117; *Shargold v. Shargold*, cited in *Ward v. Turner*, 2 Ves. sen. 440; *Habergham v. Vincent*, 2 Ves. jun. 231; *Allison v. Allison*, 4 Hawks, 141. On the other hand, if the provisions of the instrument be testamentary in their character, if the intention of the maker to dispose of his estate after death be sufficiently manifested, and this intention be lawful in itself, and the writing having the statutory formalities, the instrument will operate as a will, whatever may be its form: *Lawson v. Lawson*, 1 P. Wms. 440; *Hall v. Hewer*, Amb. 203; and the cases cited *supra*. The instrument, the character of which we are considering, does not call itself a deed, as the instrument in *Wheeler v. Durant*, 3 Rich. Eq. 453, did, which was the principal foundation of the doubts expressed in that case concerning the testamentary character of the writing there in controversy. It does not profess to have been delivered, and the omission of the internal evidence of this fact of delivery, which fact is essential in the execution of a deed, is a principal ground in *Ragsdale v. Booker*, 2 Strobb. Eq. 248, for holding the writing there in question to be testamentary. It contains no unequivocal words of immediate grant; for the word "give" is quite as appropriate and as commonly used in a will as a deed; the word "make," utterly unintelligible in some of the instances of its employment, here is in all the instances as applicable to a will as a deed; and the word "bequeath" is characteristic of a will, and controls the other equivocal words of gift.

This paper has the salutatory words commonly employed in a deed, "know all men by these presents," but these words are in no respect contradictory of a will; and similar, even stronger, words were used in instruments adjudged to be testamentary in the cases of *Habergham v. Vincent*, 2 Ves. jun. 231; *Allison v. Allison*, 4 Hawks, 141; and see *Alexander v. Burnett*, 5 Rich. L. 189. It omits, moreover, in the attestation the characteristic words of a deed, "signed, sealed, and delivered," so well known and used as to be familiar to the most ignorant scriveners, and employs instead the words "made and executed," confessedly equivocal, but rather pertinent to a will than a deed. It also has a seal, but this concludes nothing, for seals, however unnecessary, are generally appended to wills. It was delivered to the donee, or deposited with him, but the

property was not delivered, and the instrument is not a symbolic delivery of the property unless present title was intended to be conveyed. It has, in addition to the good consideration, a maternal affection, the nominally valuable consideration of one dollar; yet this circumstance, although certainly unusual in formal wills, occurred in some of the cases which have been cited, and was treated as inconsequential and insignificant. It has an informal *habendum* and *tenendum* clause, and such clause is usual in deeds conveying real estate, not common in bills of sale, and more unusual in wills, yet not inconsistent with testamentary dispositions; and the words "to have and to hold the said negroes, Harriet and Ellen," immediately follow the phrase "with their future issue and increase," at least unnecessary when a present title, even with deferred possession, is intended to pass, and they are immediately followed by the phrase "to be at his [the donee's] disposal when and wherever he may think fit or appoint."⁴ This latter phrase might possibly, in an instrument otherwise definite in character as a deed, receive the interpretation that the donee, whenever it was matter of convenience to him, might dispose of the chattels by absolute or conditional sales before he came into possession; but to my perception, the phrase contains a strong implication that some act future to the execution of the instrument was to be done by the donee before his title vested. The slaves were to be his property and "at his disposal," whenever in time to come he should think fit or determine to take them on the conditions and charges imposed. He was to "appoint" this time. Also the nature of these charges, that the donee, when he came into possession of the slaves at donor's death, should pay certain sums of money to other descendants of the donor, without the creation of any lien on the property given, affords some indication that the writing was intended to be testamentary. Then the double execution of the instrument, although certainly on the same day and before the same witnesses, and probably in immediate sequence, manifests to some extent that the appendix was a codicil, and that the whole instrument was intended to be revocable; and this manifestation receives some additional force from the nature of the requirement in the appendix, that the donee should settle the slaves upon another in case of his death without leaving issue.

It is argued that the judgment of the court of law in *Alexander v. Burnett*, 5 Rich. L. 189, is opposed to the conclusion to which this reasoning tends. But in that case the words of im-

mediate grant, inappropriate to a will, "grant, bargain, and sell," were used, there was an express warranty, the instrument was intrinsically denominated a deed, and the property was actually delivered, and all the forms of a deed were observed. It did contain words, "this deed of gift to be of no effect whatever until my [donor's] death," which might well divide opinions, and upon which the judges did differ, but without contesting the judgment of the majority, that these words referred to enjoyment, and not to title, the case is palpably distinguishable from the one in hand.

Upon the construction of the whole instrument now in question, we are of opinion that it is testamentary, and that, as it lacks the number of witnesses required by our statutes for testaments, it does not obstruct the relief sought by plaintiffs. It is ordered and decreed that the circuit decree be affirmed and the appeal dismissed.

JOHNSTON, DUNKIN, and DARGAN, chancellors, concurred.

Appeal dismissed.

DISTINCTION BETWEEN DEED AND WILL: See *Johnson v. Yancey*, 65 Am. Dec. 646, and cases cited in the note 647; *Wall v. Wall*, 64 Id. 147; *Wellhorn v. Weaver*, 63 Id. 235, and note 243-246; *Watkins v. Dean*, 31 Id. 583, and note 585; *Hileman v. Bouslaugh*, 53 Id. 474.

WILL IS AMBULATORY UNTIL TESTATOR'S DEATH: *Estate of Norris*, 65 Am. Dec. 545, and note citing prior cases; *Marsh v. Marsh*, 64 Id. 598.

GADSDEN v. CARSON.

[9 RICHARDSON'S EQUITY, 252.]

INDIVIDUAL CREDITORS OF PARTNER HAVE NOT SUCH EXCLUSIVE RIGHT TO PAYMENT out of his individual property as to render fraudulent an assignment of it for the benefit of the firm creditors.

INDIVIDUAL CREDITOR OF PARTNER MAY, IN EQUITY, COMPEL PARTNERSHIP CREDITOR to resort first to the partnership assets for payment, since the claim of the individual creditor applies only to the private property of his debtor, including whatever balance may remain to him out of the firm assets after its affairs are wound up, while the partnership creditor is entitled to payment not only out of the firm property, but also out of the private property of the individual partners.

PARTNERSHIP CREDITOR, AFTER EXHAUSTING PARTNERSHIP FUNDS, IS ENTITLED EQUALLY WITH INDIVIDUAL CREDITORS to payment of an unsatisfied balance of his debt out of the private property of a partner.

ASSIGNMENT FOR BENEFIT OF CREDITORS THAT INCLUDES ONLY PART OF DEBTOR'S PROPERTY, and exacts from the creditors a release of the debtor, is fraudulent.

ASSIGNMENT BY PARTNER FOR BENEFIT OF CREDITORS that exacts a release of the firm as well as of himself, is fraudulent.

BILL to set aside assignment for the benefit of creditors as fraudulent, and Carson, Furman, and Harlee are made defendants. The plaintiff was an individual creditor of Carson, who was a member of the firms of Elisha Carson & Son and Carson, Belser, & Co. The deed of assignment sought to be set aside was made by Elisha Carson to Furman. It assigned Carson's private property, but not the whole of it. It provided for the payment both of debts of the two above-named firms respectively, and of the assignor's individual debts. And it exacted from the creditors who were to receive the benefit of the assignment a full release to Elisha Carson, James M. Carson, his son, and Belser, who were the constituent members of the two firms. Harlee, who was a creditor of both firms, had accepted the assignment and executed a release. The court set aside the assignment and decreed further relief in the premises. Harlee appealed.

Mitchell, for the appellant.

Magrath and McCrady, for the complainant.

Martin, for Furman and Carson.

By Court, **JOHNSTON**, Chancellor. This court is entirely satisfied with the substance of the decree.

We are not prepared to say that the individual creditors of one who is a partner have such an exclusive right to payment out of his individual property as to render it fraudulent for him to appropriate it, or a portion of it, to the payment of the debts of the firm with which he is connected, and for which he is bound. Our opinion on that subject is, that the right of such creditor extends only thus far, viz.: inasmuch as his claim applies only to the private property of his debtor (including as such whatever dry balance may remain to him out of the firm after its affairs are completely wound up), while a partnership creditor has a right to be paid, not only out of the joint property of the firm, but also out of the property of the individual partners. The private creditor, who has only one fund to resort to, has an equity to compel the partnership creditor, who has two, to resort first to the partnership assets until he exhausts them; but after this is done, the partnership creditor has as good a right to be paid any balance still remaining unsatisfied out of the private property of the partner as any other of his individual creditors. This is in conformity to the case of *Wardlaw v. Gray*, Dud. Eq. 113, with which we see no reason to be dissatisfied.

But it is sufficient to condemn the assignment of Carson, that

while he has required a release to himself, and to the firm of Carson, Belser, & Co., he has not made a full surrender of his property. A debtor who surrenders only part of his property has no right to exact a release as the condition of his creditor's acceptance. What right can he have to exonerate his unassigned assets from his just debts? What right can he have to retain part of his property, and offer another part, and require that the latter be accepted as full satisfaction? Such a pretension has been too often and too explicitly condemned to leave the law at all doubtful on this point.

It is not necessary to look particularly at the condition imposed, requiring a release to the firm as well as to himself; but it seems to be obvious that such an exaction is unjust and unfair to the creditors of the assignor. Whenever debts of the firm are paid by the private property assigned, to that amount Carson becomes a creditor of the firm. Though it is said the firm has also made an assignment, it nowhere appears that there may not remain a balance sufficient to reimburse this partner for his advances. But after he is released, what is to prevent his putting this in his pocket at the expense of the releasing creditor? And as the partnership is also to be released, is not the creditor deprived of his right, by subrogation, to recover from the firm what his debtor has advanced for its benefit?

It is needless to pursue this subject. The chancellor was well warranted in his conclusion that the assignment was partial, and therefore fraudulent, and in setting it aside as such.

We regard the order continuing the functions of Mr. Furman, divested of the power to apply the assigned assets to the purposes of the assignment, as an order appointing him receiver. No ground of objection has been taken to this, and therefore we see no reason to interfere with it.

The decree is therefore affirmed, with the modification indicated in the foregoing opinion as to the distribution of the individual and partnership assets, and the appeal dismissed accordingly. But we are disposed to enlarge the order for the benefit of the defendant Harlee. It is represented in his answer that he has some interests in virtue of a prior assignment made by Carson in 1854, or some other time. The master will therefore inquire into the evidence of this, and include in his report the nature and subjects of said prior assignment, and what said Harlee is entitled to under it, with any special matter. And it is so ordered.

WARDLAW, chancellor, concurred.

DUNNIN, chancellor. In respect to the invalidity of the assignment, I concur in the result, and I concur also in the modification of the decretal order.

Decree modified.

PARTNERSHIP PROPERTY IS PRIMARILY LIABLE FOR PAYMENT OF PARTNERSHIP DEBTS, and individual creditor may compel partnership creditor to resort to this fund first, but when this is exhausted, the partnership creditor has an equal right to be paid the balance of his debt out of the private property of any partner. The following cases in this series in whole or in part sustain this rule: *Miller v. Estill*, 67 Am. Dec. 305; *Cummings's Appeal*, 64 Id. 695; *Baker's Appeal*, 59 Id. 752; *Allen v. Center Valley Co.*, 54 Id. 333; *Camp v. Grant*, Id. 321, note 327; *Emanuel v. Bird*, Id. 200, note 203; *Ladd v. Griswold*, 46 Id. 443; *Bardwell v. Perry*, 47 Id. 687, and cases cited in the notes. In Massachusetts, by statute, the separate estate of the partners must be distributed first to the separate creditors: *Howe v. Lawrence*, 57 Id. 68, and note.

ASSIGNMENTS FOR BENEFIT OF CREDITORS EXACTING RELEASE: See *Wilson's Accounts*, 45 Am. Dec. 701, and note 709, citing prior cases; *Miller v. Conklin & Co.*, 63 Id. 248.

MOORE v. HOOD.

[9 RICHARDSON'S EQUITY, 311.]

BILL FOR ACCOUNTING LIES AGAINST GUARDIAN APPOINTED IN ANOTHER STATE AND HIS SURETY.

COURT PURSUES LAWS OF ITS OWN STATE IN DETERMINING VALIDITY OF JUDGMENT of a court of a foreign state, in the absence of evidence of a difference in the laws of the latter state.

ALL PERSONS, WHETHER ADULTS OR INFANTS, WHO ARE INTERESTED IN SUIT IN EQUITY, SHOULD BE MADE PARTIES THERETO.

TO ENABLE GUARDIAN TO ALIENATE WARDS' PROPERTY, he must obtain an order from a court of competent jurisdiction, in a proceeding in which the wards are made parties; an order of sale obtained upon his *ex parte* application is a nullity.

GUARDIAN IS LIABLE TO ACCOUNT TO WARDS FOR FULL VALUE OF CHATTELS sold, under order of sale obtained upon his *ex parte* application.

BILL for an accounting by John and Mary Moore, wards, against Thomas S. Hood, guardian, and John H. Hood, surety. The matter was first referred to a commissioner, who reported that certain slaves became the property of the plaintiffs under the will of John Harris. Thomas O. Hood was appointed their guardian by a court of North Carolina, and upon his guardian's bond John H. Hood was surety. The guardian applied, *ex parte*, to the court of North Carolina for an order of sale of the slaves, on the ground that the slaves were kept at a loss, and that the interests of the wards would be promoted by the sale.

The order of sale was made, pursuant to which the guardian sold the slaves. He did not obtain an adequate price for the slaves, though this, as the commissioner reported, was due to no fault of his, and the sale was fairly conducted. The cause was first presented upon exceptions to the conclusions reached by the commissioner, and the court decreed that the defendants be charged with the true and full value of the slaves at the time of the sale, with interest thereon from the day of the sale. The defendants appealed: 1. Because the court erred in so decreeing, instead of charging the defendants with the price bid; 2. Because the order of sale was made by a court of competent jurisdiction, and the sale was made pursuant to the laws of that jurisdiction, and was therefore a valid sale; 3. Because this court has no jurisdiction, and the defendants are not liable to account herein.

Williams, for the appellants.

Clinton, contra.

By Court, *WARDLAW*, Chancellor. The objection to the jurisdiction of the court, presented by the third ground of appeal, lacks even plausibility. The suit is for account by wards against their guardian and his surety, who had also been executors of the estate from which the property of the plaintiffs now in controversy was derived; and account is one of the most general heads of jurisdiction in this court, and most commonly exercised, as in the present instance, in suits by beneficiaries against trustees. It is immaterial that the trustee here was invested with his powers and duties by a foreign tribunal; for surely his fiduciary relation is not terminated by removal of himself and the trust funds beyond the limits of the state in which he was appointed. It would disgrace the courts of any civilized country to afford immunity to a trustee who fled to their jurisdiction that he might embezzle the funds committed to his trust. This suit is not on the bond of defendant as the gist, such as an action of debt, which can be prosecuted only in the court of common pleas. It is a bill for account, in which the bond is used merely as collateral evidence of the defendant's liability.

The second ground of appeal affirms that the order for sale of the slaves was granted by a court in North Carolina which had jurisdiction of the subject according to the laws of that state; and that the sale was made according to these laws, and should be treated as valid by foreign tribunals.

It sufficiently appears that the court of pleas and quarter

sessions which granted this order has jurisdiction of the subject under the law of North Carolina; but no proof is offered that by the procedure of that court a guardian on his single petition can obtain lawful authority to sell the slaves of his ward, nor indeed that the law of that state affecting the questions of this case differs from the law of South Carolina. If such proof had been made, we might have recognized and followed the law and procedure *loci contractus*, but in the absence of such proof, we are left to the lights within our territory, and must decide the case as if the order had been granted by a court of this state of competent jurisdiction. It is fairly presumed that states deriving their institutions from a common origin proceed on the same principles of adjudication, and attain the same conclusions, unless changes by legislation or decisions be shown: *Reid v. Lamar*, 1 Strobb. Eq. 38, 39. Putting aside this fact of common origin, every court necessarily pursues its own rules and doctrines for the interpretation and execution of contracts and judgments, although made or pronounced in a foreign country, where the evidence exhibits no difference concerning the subject in the law of the foreign country. No other mode of decision is rational and practicable.

In equity, the general rule is that all persons, whether adults or infants, shall be made parties to a suit who are materially interested in the object of the suit and the questions to be therein decided. As between trustees and beneficiaries, all of both classes are necessary parties generally, although an exception is tolerated in suits by beneficiaries where one of several trustees is pursued for his particular breach of trust; and exceptions are allowed in suits by trustees: 1. Where the object of the suit is merely to obtain from some third person possession of the trust property, and it is indifferent to the equitable claimants whether the trustees succeed or fail; and 2. Where the trustee fully represent the beneficiaries. The last exception is the only one requiring consideration in this case. The most familiar instance of this exception is in suits by or against executors and administrators concerning the personalty, as to which they are by law the owners and the representatives of the legatees and distributees; and usually in such suits the rights of the beneficiaries are held to be sufficiently represented and their interests protected in the names and persons of their said trustees: *Story's Eq. Pl.*, secs. 207, 208; *Calvert on Part.* 8, 20, 207, 315.

The rule requiring beneficiaries to be parties where they are interested in the questions for adjudication is applicable, al-

though the trustees have the legal title, for trustees are not the real owners of the trust estate, and are rather agents of the beneficiaries for the execution of certain trusts, and it is among their duties to require the real owners to be brought before the court: *Weatherby v. St. Giorgio*, 2 Hare, 624; *Holland v. Baker*, 3 Id. 68. Of course the rule is more vigorously exacted where trustees have not the legal title of the trust estate. It was adjudged in *Bailey v. Patterson*, 3 Rich. Eq. 156, and recognized in *Long v. Cason*, 4 Id. 60, that a guardian has not the legal title of his ward's chattels, and that his sale of them is voidable at the option of the ward. Long ago it was decided in *Inwood v. Twyne*, Amb. 41, S. C., 2 Eden, 148, that a guardian could not change the character of his ward's estate without the authority or sanction of the court; and this doctrine was recognized in *Capehart v. Huey*, 1 Hill Ch. 409. In my opinion, alienation by a guardian of his ward's chattels, under an order obtained on his *ex parte* application, is not materially distinguishable from his private, self-moved alienation. On such application the court does not properly pronounce any judgment, and simply expresses a professional opinion, assuming the truth of a one-sided statement of facts which may mislead. Suppose one formerly guardian should obtain an improvident order from the court on his single petition for the sale of his late ward's chattels, after the ward had obtained full age, upon some showing, apparently strong, that a sale was necessary for the convenience of settlement, or other reason, none would contend that the owner would be barred by the plea of *res judicata*; and surely infants, a class peculiarly within the protection of the court, are entitled to as benignant relief as adults in the same circumstances. In the case supposed, the fiduciary relation would not be terminated until full and fair settlement between the guardian and adult ward; and the case of an infant seems to be stronger where trust and disability concur in his behalf.

It is argued that the order of the court in this case is, in effect, a mere direction to a trustee concerning the management of his trust, and that in such applications for direction and advice guardians sufficiently represent their wards. This reasoning proceeds on misapprehension of the facts. Management of an estate implies its administration in its existing state; but the order here affected the *corpus* of the estate and a change of its nature. Authorities have already been cited to show that a guardian is not legal owner, and cannot change the nature of his ward's estate without judicial leave obtained in a regular suit

where the real owner may be heard. Again: the court owes the duty of determining the rights of litigants when presented by regular pleading, and has the power of compelling parties to execute its decrees; but it is under no obligation to bestow professional counsel on those who may solicit advice, however earnestly, in violation of the rules of practice, and cannot enforce its opinions upon persons unrepresented in a controversy. Trustees of charities perhaps may obtain directions from the court without much nicety in their forms of application; but ordinary trustees have no privilege not belonging to suitors generally.

The practice of this court in South Carolina on this subject of parties to suits was not formerly so strict as that which now prevails. In *Spencer v. Bank*, Bailey Eq. 468, land had been sold for payment of the debts of an intestate under a decree of this court obtained on the *ex parte* petition of the widow of the intestate, she being a distributee and the administratrix; and it was held that infant distributees were bound by this decree so far as the title of the purchaser of the land was involved. There were other important issues in this case, and the judgment has always been followed and approved so far as it decided that a master or commissioner is a proper substitute for the parties to make conveyances in partition (which was the great point in controversy), and so far as it decided that infants equally with adults are bound by a decree until it be reversed or vacated. It is very questionable, however, whether in the stricter procedure now pursued an administrator would be recognized in this court as adequately representing the heirs in a suit concerning the lands. As to personalty, he, being the legal owner, may be treated as representative of the distributees; but as to real estate, he is representative only because the statute 5 Geo. II., c. 7, 2 Stat. 570, makes lands, like personalty, liable in this state to the satisfaction of the demands of general creditors. In the construction of this statute, the law court determined, *Martin v. Latta*, 4 McCord, 129, *D'Urphy v. Neilson*, Id., note, that the lands of a testator or intestate may be sold for his debts under a *fi. fa.* against his executor or administrator, without making devisees or heirs parties to the proceeding by notice or otherwise, and although there might be personal assets sufficient to satisfy the debts. The doctrine of these cases has been much disparaged in subsequent cases, *Hull v. Hull*, 3 Rich. Eq. 87, and cases there cited, but not overruled; and it afforded the principal ground for the decision in *Spencer v. Bank*, Bailey Eq. 468, on the point in question. This last case, rightly or wrongly decided, does

not conclude the one under consideration, for the reasons that there is a great difference, already discussed, in the power over the estate between an administrator and a guardian; that there, and not here, the controversy was with an innocent purchaser, and that more recent cases support the doctrine of the circuit decree now in question.

It is not intended to be intimated that the purchaser in this case could not have been successfully pursued if he and the slaves had been found within the jurisdiction. The sound view as to the protection of purchasers in judicial sales is well expressed by Lord Redesdale, in *Bennett v. Hamill*, 2 Sch. & Lef. 577, 578. "A purchaser may rightfully presume that the court, before its order for sale, used the proper measures for the investigation of the rights of parties, and on such investigation properly decreed a sale; but he must see that the decree binds the parties claiming the estate, or in other terms, that all parties to be bound are before the court."

In *Boggs v. Adger*, 4 Rich. Eq. 408, it appears by the circuit decree, most of which is suppressed in the report, that Chancellor Harper, who delivered the opinion of the court of appeals in *Spencer v. Bank*, *supra*, refused to make any order on the petition of an administrator to change the investment of infants' funds, although confessedly judicious, on the ground that the infants were not parties to proceeding.

In *Sollee v. Croft*, 7 Rich. Eq. 43, it was held that orders for sale of the trust estate of infants, obtained on the *ex parte* petition of the trustee, do not operate as estoppels of the infants. The reasoning on which the decreed proceeds is, that it is plainly unjust and against equity that any claimant, legal or equitable, should be barred by the judgment in a controversy where he was not fully represented, nor permitted to assert his rights before the court, and that infants should be represented by responsible next friends who have no adversary interests which might obstruct the full hearing of the infants' claims. This is a direct authority on the question. No distinction between that case and the present has been suggested, except that there the trustee was himself the purchaser of the slaves sold. The slave Jim, and the hire of the slaves while in Pearson's possession, for which the trustee was charged, are not within this distinction; but passing by this, the purchases of the trustee had been expressly confirmed by the court on his petitions, and the practical question of the case was whether the infants were so represented by the trustee as to be barred by the decrees; and it was adjudged that they were not.

Judge Evans, speaking for the law court in *Wadsworth v. Letson*, 2 Speers, 277, says: "The decisions fully established that where effect is attempted to be given to the judgments of another state they are examinable, so far at least as to inquire whether the defendant was a party to the proceeding; for by the laws of all civilized countries no man is bound by a judicial proceeding where he was no party, had no notice, and no opportunity of making his defense:" See *Miller v. Miller*, 1 Bailey L. 242; *Shumway v. Stillman*, 6 Wend. 449. If the foreign court recognized as a party the person sought to be charged here, effect would be given to that recognition, although he may not have been made a party according to our procedure.

The second ground of appeal is dismissed.

On the first ground, it is deemed unnecessary to make additional remarks.

It is ordered and decreed that the circuit decree be affirmed, and the appeal dismissed.

JOHNSTON and DARGAN, chancellors, concurred.

DUNKIN, chancellor, delivered a dissenting opinion.

Appeal dismissed.

EQUITY MAY COMPEL NON-RESIDENT GUARDIAN and sureties to account: *Wright v. Wright*, 67 Am. Dec. 767.

FOREIGN LAWS MUST BE PROVED; THEY WILL NOT BE TAKEN NOTICE OF JUDICIALLY: *Whidden v. Seelye*, 63 Am. Dec. 661, and cases cited in the note 865; *Peck v. Hibbard*, 62 Id. 605; *Bufford v. Holliman*, 60 Id. 223. They must be pleaded as well as proved: *Peck v. Hibbard*, 62 Id. 605; *Gunn v. Howell*, Id. 785.

ALL PARTIES INTERESTED SHOULD BE JOINED IN SUIT IN EQUITY: *Howell v. Harvey*, 39 Am. Dec. 376; *Beardsley v. Knight*, 33 Id. 193; *Herrington v. Hubbard*, Id. 426; *Dow v. Jewell*, 45 Id. 371.

SNODDY v. FINCH.

[9 RICHARDSON'S EQUITY, 355.]

PERSON PROPERLY ENTITLED TO CUSTODY OF TITLE DEEDS OF HIS ESTATE may come into equity and obtain a decree for a specific delivery of them if they be wrongfully withheld.

BILL TO OBTAIN SPECIFIC DELIVERY OF TITLE DEEDS SHOULD ALLEGED danger of loss or destruction of the deeds in the keeping of him who withholds them.

POWER OF ATTORNEY IS ESSENTIAL PART OF CONVEYANCE BY ATTORNEY, and the grantee may maintain a bill against the attorney for its specific delivery, but since other purchasers from the attorney may need the instrument to establish the agency, the court will decree that the defendant deposit it with the register of the court for the use of all interested.

BILL to obtain possession of a power of attorney, or to have it placed in safe custody. The opinion states the case.

Bobo, for the appellant.

Dawkins, *contra*.

By Court, **WARDLAW**, Chancellor. The plaintiff, John Snoddy, received a conveyance for a tract of land in Spartanburg district, November 16, 1853, which was executed in the name of Harvey Finch, by the defendant John S. Finch, as attorney in fact. The defendant acted under a regular power of attorney, attested by two witnesses; but these witnesses reside in Alabama, and neither of them has made probate of the execution of the instrument, nor has the instrument been recorded. The plaintiff, justly regarding the power of attorney as an integral part of his conveyance, sought its delivery from defendant, and at one time the latter, while the plaintiff held the paper in his hands, promised to deliver it to plaintiff if he would pay the price of the land; whereupon the plaintiff laid the paper on a table, paid a portion of the purchase money, and drew his note for the balance, and the defendant picked up the power, saying he should keep it for his own protection, as he had sold some personalty under the same authority. Mr. Edwards, one of the counsel of plaintiff, testifies that he too applied to defendant for the power, and proposed that it should be sent to Alabama for probate, at the joint expense of the parties; but defendant declined this proposal, as the paper might be lost by the way, and offered on his part to give a copy. The pecuniary means of the defendant are ample. The plaintiff is in possession of the land, and no special jeopardy of his title is alleged. Defendant admitted he had a receipt from his principal ratifying his acts as agent.

The bill was filed to obtain possession of the power of attorney, or to have it placed in safe custody. The chancellor on circuit dismissed the bill for want of equity, and the plaintiff appeals.

A person properly entitled to the custody of the title deeds of his estate may obtain a decree for a specific delivery of them if they be wrongfully withheld or detained from him. This is a very old head of equity jurisdiction, for it has been traced back to the reign of Edward IV.: Mitford's Pl., by Jeremy, 117, note 1; 2 Story's Eq. Jur., sec. 703; *Armitage v. Wadsworth*, 1 Madd. 192. Some remedy in such case might be afforded in a court of law by action of trover or detinue; but as damages

only are recoverable there, the relief is much less adequate and complete than by a decree for specific delivery. A bill for such purpose ought to allege danger of loss or destruction of the deeds in the keeping of him who withholds them; but the defendant here does not complain of the omission of this allegation, and his misconduct in regaining possession of the letter of attorney justifies apprehension of the safety of the paper in his custody. He does not need it for his own protection, as the receipt of his principal secures him against the disavowal of the agency; and it is an essential part of the conveyance to plaintiff, and without the adduction and proof of it, he could not demonstrate in any suit his title to the land. It might be held without straining that the defendant delivered it to the plaintiff, and then retook it by artifice.

It is possible that defendant or other purchasers from him as agent may find occasion for the use of this instrument in establishing the agency; and this may constitute a sufficient reason for not placing the power in the exclusive possession of plaintiff, when full relief may be administered to him in another form.

It is ordered and decreed that the circuit decree be reversed, and that defendant deposit said power of attorney in the office of the register of this court for Spartanburg district, with leave to any party having an interest in it to apply to the court for an order for its use. Let the defendant pay the costs.

JOHNSTON, DUNKIN, and DARGAN, chancellors, concurred.

Decree reversed.

CASES AT LAW
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

MURRAY v. SOUTH CAROLINA RAILROAD COMPANY.

[10 RICHARDSON'S LAW, 227.]

SOUTH CAROLINA FENCE LAW REQUIRES CATTLE TO BE FENCED OUT, AND NOT IN. It is therefore not unlawful for the owner of horses to permit them to run at large over lands not guarded by such a fence as the law prescribes.

ENTRY OF HORSE UPON UNENCLOSED RAILROAD TRACK IS NO TRESPASS, and the owner thereof is not guilty of negligence in allowing him to be at large.

OWNER RUNS RISK ONLY OF ACCIDENTAL INJURIES TO HORSE which he permits to run at large, and can recover for any injury thereto from the negligence of another.

PROOF OF DAMAGE DONE BY RAILROAD TRAIN ESTABLISHES CASE OF NEGLIGENCE, and not of accident, where nothing more appears; and the burden of proof is thereby thrown upon the railroad company to show want of negligence in its agents in charge of the train; and their absence at the trial creates a strong presumption against the company, for they alone could give the circumstances attending the doing of the injury.

THAT HORSE WAS KILLED IN NIGHT-TIME BY RAILROAD TRAIN DOES NOT RELIEVE COMPANY OF BURDEN OF PROOF that the killing was accidental, and not by negligence.

OBSTRUCTION OF PUBLIC CROSSING OVER RAILROAD IS NUISANCE; and the company is liable for all the consequences that may ensue from leaving a crossing obstructed by a train of cars.

SPEED OF TRAIN MUST BE SLACKENED AND SUFFICIENT WARNING GIVEN when a crossing is approached; and these requirements must not appear to have been disregarded in any instance, when the company undertakes to show that all proper means were used to prevent the injury complained of.

CASE by the plaintiff for the value of a horse killed by one of the defendant's trains. The horse had been borrowed by one Magill, who left him tied on the opposite side of the railroad

track from the plaintiff's house. In Magill's absence the horse broke the rope, and followed the public road in the direction of the plaintiff's house, until the defendant's track was reached. Finding the crossing obstructed by a train of cars on a turnout, the horse wandered about the track until into the night, when another of the defendant's trains came along and killed him. From the tracks of the horse, it appeared that he had been chased some distance by the cars before being overtaken. A nonsuit was moved for, but refused; and the defendant introducing no evidence, the case was submitted to the jury upon instructions to the effect that it was only necessary for the plaintiff to prove the fact of the killing by the defendant's train, and that thereupon a presumption of negligence arose which the defendant must rebut; that as the injury was committed by it, and its agents and servants were the only persons who could furnish the requisite information, their absence at the trial raised a strong presumption against it; that animals had the right to wander upon the uninclosed portions of the railroad track, and that if any injury occurred to them from the agents of the railroad company, it must be shown that the injury happened without negligence on their part. The defendant appealed, and renewed its motion for a nonsuit, and also moved for a new trial for errors in the instructions to the jury. Further facts appear in the opinion.

Conner, for the appellant.

Pressley, contra.

By Court, **WARDLAW, J.** Beyond the statements of the report, it appears to this court that the meeting-house where the horse was hitched was four or five miles west of the railroad; that the road which the horse followed was a public road; that there is on the railroad a deep cut at the crossing of the public road, and for a considerable distance above and below it, the crossing being made practicable by cutting down, at that point, the banks on either side; that the train of cars which obstructed the crossing was a freight train that had early in the evening stopped for the night; and that the passenger train which killed the horse seemed, so far as could be judged from the footprints of the horse, to have passed the turnout without slackening speed, and to have overtaken the horse running briskly.

The fence law, which has prevailed in this state from a time soon after the distinction between forest and cultivated lands was made by the settlements of Europeans, has always required

that cattle should be fenced out, and not fenced in: See Acts 1694, 2 Stats. 81; 1827, 6 Stats. 331. It is not, then, unlawful for the owner of horses or cows to permit them to go at large, so as to roam upon all lands, of his own or of others, that are not guarded by a fence such as the law prescribes; and the entry of a horse or cow upon the uninclosed track of the railroad is no trespass. The owner of cattle who permits them to roam runs the risk of all damage which they may accidentally receive, and so may sometimes be said to be negligent of his own interest; but he is not guilty of legal negligence such as embarrass his recovery from a person who through negligence hurts the cattle.

This court perceives no negligence, then, on the part of the plaintiff to be ascribed to the conduct of his bailee, who, after attempting in vain to catch the horse that had been fastened in the ordinary way and had escaped, refrained from pursuing him four miles, and allowed him to go at large upon the public road that led to his stable.

The court acquiesces, too, in the reference which the recorder made to *Danner v. South Carolina R. R. Co.*, 4 Rich. L. 329 [55 Am. Dec. 678], for the presumption which arises from the killing of the horse by a train of cars, established and unexplained, and for the unfavorable inference raised by the absence of all the defendant's agents who were at the killing.

Negligence, rather than accident, is shown by proof of damage done by a train when nothing more appears. The nature of the machinery used, and of the railway on which it is used, and the risk which, from any obstruction encountered, the engineer and all the lives and property under his care necessarily incur, are not of themselves sufficient to rebut the presumption of negligence; but these matters are worthy of much attention, and when strengthened by other sufficient circumstances, would avail to rebut. Such other circumstances must usually come from the agents of the railroad company, who alone are usually cognizant of them, and in the absence of such agents, cannot be established by conjecture. In this case it appeared from the plaintiff's testimony that the killing of the horse was done at night. That of itself is insufficient to show that the killing was accidental. If it had been proved that the night was foggy; that the train was in all respects properly equipped and managed; that the horse suddenly jumped upon the track, or stood still, or was hidden from view by a curve in the road; or, in general, that from the time the horse could first have been seen until he was killed all proper means and appliances were used

to avoid him, and used in vain—a case of accident would have been made out.

But, beyond the ordinary presumption, un rebutted, it appears in this case that the public road along which the horse attempted to cross the railroad was obstructed by the company's cars, and that the horse wandered up and down in the cut, whose banks he could not climb. The obstruction of the public road was a wrong done by the company which, under such circumstances, would have justly entitled the plaintiff to recover, even if the killing by the passenger train had been shown to be, so far as that train was concerned, wholly accidental and blameless. The thirty-third section of this company's charter, 8 Stats. 415, gives to the company the right to run its track along or across a public road only on condition that the road shall not be thereby obstructed; therefore the banks of the cut were sloped at the crossing. The obstruction of the crossing was a nuisance. Either the turnout should have been large enough for the trains which stopped there to have stood above or below the crossing, or else the cars of a train at rest should have been detached, so as to give a free passage. This duty of leaving crossings unobstructed, which both common law and statute require, must be observed by the company, unless it is willing to take all consequences that may ensue from its violation. There is a further duty of slackening speed in passing a turnout, and still a further one of giving sufficient warning when a crossing is approached (both of which are recognized by the custom of railroads, and, we believe, by the regulations of this company, and both of which are brought to mind in this case), which must not appear to have been disregarded in any instance where the company undertakes to show that all proper means were used to avoid damage complained of.

The motion is dismissed.

O'NEALL, WITHERS, and WHITNER, JJ., concurred.

Motion dismissed.

COMMON-LAW RULE REQUIRING CATTLE TO BE FENCED IN, AND NOT OUT, WHERE IN FORCE: See *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 239, and note, where the question is considered at length; *Vicksburg etc. R. R. v. Patton*, 66 Id. 552, and note collecting other cases. The principal case is cited in *McCall v. Chamberlain*, 13 Wis. 640, and *Curry v. Chicago etc. R'y*, 43 Id. 682, to the point that the reason that the common-law rule in regard to fences has not been adopted in some of the states is that its strict enforcement would be productive of hardships where raising of live-stock forms an important feature of the industry of the country.

LIABILITY FOR INJURIES TO ANIMALS TRESPASSING ON RAILWAY TRACKS: See *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 239, and note thereto fully discussing the question; see also *Vicksburg etc. R. R. v. Patton*, 66 Id. 552, and note collecting other cases.

HOW FAR NEGLIGENCE IS PRESUMED FROM MERE FACT OF INJURY: See *Holbrook v. Utica etc. R. R.*, 64 Am. Dec. 502; *Chicago & M. R. R. v. Patchin*, 61 Id. 65, and notes thereto. The killing of cattle by a railroad train is *prima facie* evidence of negligence: *Roof v. Railroad Co.*, 4 S. C. 62, citing the principal case.

MARTIN v. MANER.

[10 RICHARDSON'S LAW, 271.]

ORDER DRAWN ON PARTICULAR FUND, AFTER NOTICE TO DRAWER, CONSTITUTES EQUITABLE ASSIGNMENT, and binds the fund, *pro tanto*, in the hands of the drawee.

DIRECTION BY CREDITOR FOR APPROPRIATION OF DEBT AND ASSENT OF DEBTOR is all that is necessary to constitute a legal transfer of the debt; and neither the omission nor neglect of the debtor to enter the transfer in his books could operate to defeat an arrangement dictated by his creditor and assented to by himself.

SUGGESTION, filed by the plaintiff, an attaching creditor of Samuel Solomons, against the defendant as garnishee. From the report of the presiding judge, it appears that Solomons was a factor in the city of Savannah, Georgia, and did the business of the defendant and his mother, Mrs. Catharine Maner, whose business was conducted entirely through the agency of the defendant. Solomons failed in business March 27, 1854, and the plaintiff lodged his writ in foreign attachment March 29, 1854, in the sheriff's office for Beaufort district, and a copy was served on the defendant as garnishee on March 30, 1854. On the books of Solomons, March 30, 1854, there was standing to the credit of Mrs. Maner the sum of one thousand one hundred and seventy-eight dollars and eighty-seven cents, and to the debit of the defendant two thousand three hundred and eighty-five dollars and sixteen cents. Sometime in January, 1854, there was an understanding between all the parties that a change should be made in these accounts, and about the seventh of January, 1854, the defendant, as agent of Mrs. Maner, instructed Solomons to transfer to his, the defendant's, account the amount which was due to his mother, and which he had full authority to do. The transfer was actually made in Solomons's books on March 31, 1854, as of date, however, the tenth of March, 1854. No special reason for not making the

transfer sooner was given by Solomons, but he testified that it was entirely accidental, and that had the defendant been an irresponsible man, he had no doubt he would have promptly made the transfer. There was no controversy about the fact, and no question as to the *bona fides* of the transaction. The defendant paid into court the sum of six hundred and sixteen dollars and forty-six cents, and was entitled to retain as creditor in possession, as conceded, five hundred and sixty-eight dollars and sixty-eight cents; and the balance remaining in his hands through a mistake in calculation was agreed to be seventy-one dollars and thirteen cents, though from the figures given it appears to have been twenty-one dollars and fifteen cents. The whole controversy was whether the defendant should be charged with the amount transferred from his mother's account to his own, and the case was submitted to the jury without argument. A verdict was returned for the actor in the suggestion for the sum of one thousand three hundred and seventy-nine dollars and forty-two cents, which included this amount transferred, and interest, being a factor's account for advances from March 30, 1854. The defendant appealed, and now moves for a new trial.

Fickling, for the motion.

Gillinghast, contra.

By Court, MUNRO, J. In *Tutlock v. Harris*, 3 T. R. 180, Buller, J., puts this case: "Suppose A owes B one hundred pounds, and B owes C one hundred pounds, and it is agreed between them that A shall pay C the one hundred pounds. B's debt is extinguished, and C may recover that sum against A." And in *Israel v. Douglas*, 1 H. Black. 239, A, being indebted to B, and B indebted to C, gives an order to A to pay C the sum due to him from A; the order was accepted by A, and on his refusal to comply with the order, C may maintain an action for money had and received against him. Gould, J., said: "The case is like that of a man having money due me in his hands, which I order him to pay to another. Now, if I pay money to you for another person, it is money had and received by you to his use. But where is the real and substantial difference, whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money, to which you expressly assent? In reason and sound law, it is money had and received to the use of such third person. If my debtor tenders me money, which I give back to him and tell him to pay it to another, he then, in point of fact, receives money to the

use of the other. But is there any difference between such a case and the present?" See also Ch. Cont. 532, where the whole doctrine is discussed and the authorities cited.

Nay, so far have courts of law gone in maintaining equitable assignments that they have held, when an order is drawn on a particular fund, that, after notice to the drawee, it binds the fund in his hands: *Robbins v. Bunscome*, 8 Me. 456; *Mandeville v. Welch*, 5 Wheat. 277.

Let us apply the principle to the case in hand. As the defendant's agency has not been controverted, suppose that, instead of directing the amount which was due to his principal by Solomons to be transferred to his own credit, he had drawn the fund out of Solomons's hands and paid it back to him in part payment of his own debt. As the authorized agent of his mother, it was entirely competent for him to have done so; and where, it may be asked, is the difference between his receiving the money himself and paying it back to his creditor, and directing its appropriation by the debtor of his principal either to the payment of his own debt or to any other purpose?

All that was necessary to constitute a legal transfer of the debt was the direction for its appropriation by the creditor, and the assent of the debtor; the moment the latter assented to it the transfer was complete, and neither the omission nor neglect of the debtor to enter the transfer in his books could operate to defeat an arrangement that had been dictated by the creditor and assented to by himself.

It is beyond all controversy, then, that by the operation of the agreement between Solomons and the defendant, acting as the lawfully constituted agent of his mother, the interest of the latter in the fund in question was extinguished, and became completely vested in the defendant; and it was quite immaterial, so far as concerned the validity of the transfer, whether a formal entering of the transaction had ever been made in the books of Solomons or not.

The plaintiff is therefore directed to enter a *remittitur* on the record for so much as the verdict exceeds seventy-one dollars and thirteen cents, the amount admitted to be due by the defendant; and on this being done, the motion is dismissed; but if he should neglect or refuse to enter such *remittitur* on or before the first day of March next, then the motion is granted.

O'NEALL, WARDLAW, WITHERS, and WHITNER, JJ., concurred.

Motion granted.

EQUITABLE ASSIGNMENT OF PART OF FUND MAY BE MADE BY ORDER ON AND NOTICE TO HOLDER OF FUND, and will be valid *pro tanto* without formal acceptance by him: See note to *Field v. Mayor etc. of New York*, 57 Am. Dec. 441; see also *Nesmith v. Drum*, 42 Id. 260, and note collecting other cases in this series.

CARMICHAEL v. BUCK.

[10 RICHARDSON'S LAW, 832.]

TITLE TO PERSONAL PROPERTY CANNOT BE ACQUIRED FROM ONE WHO HAS HIMSELF NO TITLE, in general, except by a *bona fide* sale in market overt, and no market overt exists in South Carolina.

SPECIAL AGENT CAN BIND PRINCIPAL ONLY TO EXTENT OF AUTHORITY CONFERRED BY PRINCIPAL; but the principal is bound by the acts of his agent, authority to do which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him.

ONA FIDE PURCHASER, WITHOUT NOTICE, OF PERSONAL PROPERTY FROM AGENT WILL BE PROTECTED, where, although the agent is intrusted with possession for a special purpose, the principal has by his act or conduct allowed the agent to appear to the world as the true owner.

TROVER. The plaintiff employed one Huggins to conduct a raft of timber down the Little Pee Dee river to Georgetown, and there deliver it to a factor at that place. Huggins employed his brother to assist him, but instead of taking the raft to Georgetown, he stopped at one of the defendant's timber depots on the river, and there sold it to an agent of the defendant, representing to him that he was the owner. The presiding judge referred the jury for the law of the case to *Powell v. Buck*, 4 Strobb. L. 427, and the jury found for the plaintiff. The defendant appealed, and moved the court for a new trial.

Harlee, for the appellant.

Simonton, contra.

By Court, **WARDLAW, J.** In the case of *Powell v. Buck*, 4 Strobb. L. 427, the defendant was made to answer to the true owner for a raft of timber, which he had purchased from a carrier under circumstances very similar to those which exist in this case. But it will be observed that there a verdict had been found for the plaintiff, under instructions which submitted to the jury questions of imputed fraud; and we cannot suppose that the case was understood by the court to settle that, in all cases of sale by a raftsmen, there should be accountability from the purchaser to the true owner without consideration of special

circumstances, although there is much in the opinion to favor such a supposition. If special circumstances, to be weighed by a jury, may modify the general rule, then the case before us must be tried again, for all special circumstances were excluded from view by the application of a rule which was taken to be inflexible.

The general rule of the common law unquestionably is, that a title to personal property cannot be acquired from a person who has himself no title to it, except only by a *bona fide* sale in market overt. In all cases of sale not in market overt (and we have no market overt in this state), the rightful owner, having committed no fault, may recover the goods sold or their value from an innocent purchaser. In like manner, the general rule is that a special agent can bind his principal only to the extent of the authority conferred by the principal; but in relation to agency, this rule is modified by a "principle which pervades all cases of agency, whether it be a general or a special agency, to act. The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in the matter, shall be bound by it:" Story on Agency, sec. 127.

This doctrine applies with equal force to protect third persons, where a principal has clothed his agent, general or special, with all the external *indicia* of property, and third persons have dealt with the agent, supposing him to be the sole principal, without any knowledge that the property involved belonged to another person: Story on Agency, secs. 93, 227, 443. Mr. Justice Buller said, in *Fitzherbert v. Mather*, 1 T. R. 16: "It is the common question every day at Guildhall, where one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit."

Our court has frequently applied this doctrine in behalf of creditors who have extended credit upon faith of the ordinary *indicia* of ownership, accompanying personal property held by one to whom the real owner has committed the possession in such way as to enable him to impose upon strangers ignorant of the true title: *Archer v. McFall*, Rice L. 77; *Ford v. Aiken*, 1 Strobb. L. 90; S. C., 4 Rich. L. 133; *Burgess v. Chandler*, Id.

175. These were all cases of possession acquired by a son-in-law from a father-in-law, but they were instances of the application of the general principles we have mentioned; for in neither of them was there in fact a gift, although the appearance of one had imposed upon creditors. Innocent purchasers are not entitled to less favor, and are not less favored by the law, than creditors.

There is no disposition to trespass upon the domain of equity courts by taking cognizance of a plea of purchaser for valuable consideration without notice, and making that plea at law available against a legal title when it would not be so held in equity; but we only apply an acknowledged principle, which is so deeply founded in justice as to have become a maxim, and which is indispensable to the security of many ordinary transactions: *Root v. French*, 13 Wend. 571 [28 Am. Dec. 482]. "Courts of law," says Mr. Story in his treatise on agency, sec. 91, "also, as far as they may, in regard to personal property, where no technical formalities are necessary to a transfer, now act upon the same enlightened principles of justice. Thus where a man without objection suffered his own goods to be sold by an officer at public auction to satisfy an execution against a third person, in whose possession they were at the time, it was held, in favor of the purchaser at the sale, that his conduct might well authorize the conclusion that he had assented to the sale, or had ceased to be the owner:" *Pickard v. Sears*, 6 Ad. & El. 474. The court there thought that it should have been left to the jury to say whether the plaintiff had not ceased to be the owner, Lord Denman saying: "The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This looks like bringing only intentional impositions under the rule, but our cases in relation to creditors, before cited, have expressly ruled that it is immaterial whether the deceitful appearance was held out by the true owner designedly or unintentionally. That the creditor or purchaser was actually deceived is not of itself sufficient; there must have been on the part of the true owner some act or conduct calculated to lead to deception, but that act or conduct may be only negligence, and not fraud—only imprudence, and not evil design.

The question between two persons entitled to equal favor,

of whom one must suffer, is, Who gave to the faithless agent that credit which enabled him to effect an imposition? If the true owner did so, then the fraud or folly of his agent would become his fraud, if he should shift the burden of loss from himself to an innocent purchaser.

Now, in the case which is before us, the plaintiff, true owner of the timber, is *prima facie* entitled to recover the value of it from the defendant, who purchased from Huggins, the raftsman; but the plaintiff's right is not so conclusive that it may not be rebutted. If it should appear that the defendant or his agent knew that Huggins was only an agent, then the defendant will be bound to abide the consequences of the agent's having exceeded his authority, unless he can show that the true owner held Huggins out to the world as one having authority to sell the raft. If it should appear that neither the defendant nor his agent knew that Huggins was an agent, but that they dealt with him supposing him to be the true owner, then it will be necessary for the defendant to go further, and show some act or conduct of the plaintiff which led to the defendant's loss; as, that the plaintiff put Huggins into possession of the raft, with the usual *indicia* of ownership, so as to enable him to hold out appearances which would have misled a prudent purchaser. Whether the possession of such a raft by two white men, who said that they had cut the timber and owned it, was sufficient evidence of ownership, the jury will consider, with reference to evidence that may be given of the usual course of the business of cutting, rafting, and selling timber on the Pee Dee.

It will not do to say that if the jury should regard Huggins as entitled to sell, then no owner of timber can trust it to a carrier without incurring the risk of loss. One obvious answer is, Let the owner employ an honest or a responsible carrier; and another is, Let him take care to show by some suitable means that the carrier is neither the owner nor an agent to sell.

Nor will it do to imagine cases in which the doctrine that may protect the purchaser in this case may be carried to an alarming extent in derogation of the rights of true owners; as, for instance, cases of negroes hired for a year, of horses hired from livery-stables, and of articles lent. As to negroes, mere possession is, upon safe grounds of distinction, held to be ordinarily much feebler evidence of ownership than it is of other chattels: *Maples v. Maples*, Rice Eq. 300; and as to horses and other articles hired or lent, surrounding circumstances will determine between the true owner and an innocent purchaser

which has by any unfairness or imprudence brought upon himself loss; and if both are equally free from all fault, the ultimate question will be, Who gave credit to the actual wrong-doer? Even where the third person who did the wrong was known to be only an agent, it is "a general rule when a commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser will be safe, although the agent may have acted wrongfully, and against his orders or duty, if the purchaser has no knowledge thereof." Story on Agency, secs. 94, 73, note; *Pickering v. Bush*, 15 East, 43. Stronger is the case, where the commodity is sent as above, and the person in possession is so held out as to appear the true owner.

Without intending, then, to indicate any opinion, and really without having formed any, on the questions which, as we have said, should have been submitted to the jury, we direct a new trial.

Motion granted.

WHITNER and MUNRO, JJ., concurred.

O'NEALL, J., dissented. —

PURCHASER OF PERSONAL PROPERTY TAKES NO BETTER TITLE THAN HIS VENDOR HAD, as a general rule: *Williams v. Merle*, 25 Am. Dec. 604, and note; *Saltus v. Everett*, 32 Id. 541, and note; *McMahon v. Sloan*, 51 Id. 601; *Agnew v. Johnson*, 62 Id. 303; and see *Rogers v. Huie*, 54 Id. 300. In case of conditional sales, see *Sargent v. Metcalf*, 66 Id. 368; *Burbank v. Crocker*, Id. 470, and notes thereto. Warranty of title, when implied: See *Scott v. Hix*, 62 Id. 458, and note considering the question; *Long v. Hickingbottom*, 64 Id. 118.

MARKET OVERT DOES NOT EXIST IN AMERICA: Note to *Williams v. Merle*, 25 Am. Dec. 609; *Worthy v. Johnson*, 52 Id. 399; *Rogers v. Huie*, 54 Id. 300.

PURCHASER WHEN OBTAINS GOOD TITLE, NOTWITHSTANDING TRUE OWNER'S CLAIM: See the question fully discussed in the note to *Williams v. Merle*, 25 Am. Dec. 605; note to *Saltus v. Everett*, 32 Id. 554; *Hoffman v. Noble*, 39 Id. 711, and note; *McMahon v. Sloan*, 51 Id. 601; *Jennings v. Gage*, 56 Id. 476; and see particularly when a *bona fide* purchaser from an agent intrusted with possession of the goods by the owner is protected: Note to *Williams v. Merle*, 25 Id. 615; and see the principal case cited on this point in *Reynolds v. White*, 13 S. C. 14.

PRINCIPAL WHEN BOUND BY ACTS OF SPECIAL AGENT: See *Pursley v. Morrison*, 63 Am. Dec. 424, and note collecting prior cases; also *Strinback v. Read*, 62 Id. 648.

KYLE v. LAURENS RAILROAD COMPANY.

[10 RICHARDSON'S LAW, 382.]

CARRIER IS LIABLE FOR LOSS OCCURRING BEYOND HIS TERMINUS, UPON CONNECTING LINE, when he receives goods and receipts for them, "to be delivered on presentation of the receipt" at a specified point beyond his limits of trade as a carrier; and delivery to a connecting line does not free him from obligation to deliver them at the specified place.

INTEREST ON NET VALUE OF COTTON LOST BY CARRIER MUST BE ALLOWED from the date of notice of loss and demand of payment of the carrier.

CARRIER IS NOT ENTITLED TO FACTOR'S COMMISSIONS AS ABATEMENT OF DAMAGES, where cotton consigned to the factor at a particular place is lost by the carrier on the road.

DAMAGES for loss of cotton by the defendant. Three suits upon like facts against the defendant were tried and decided together. The undertaking of the defendant in the receipts given by it for the cotton shipped by the plaintiffs was that it "should be delivered on presentation of the receipts at Charleston." The defendant's road did not extend beyond Newberry, but the cars containing the cotton were transferred at the end of the defendant's road to the Greenville and Columbia Railroad Company, and were taken on to Charleston, but the cotton was lost after delivery to the latter company. Both companies had offices and collected their freight in Charleston, each company having its respective freight. The jury was directed that the delivery of the cotton to the Greenville and Columbia Railroad Company did not discharge the defendant, and that the consideration of freight on the defendant's road was enough to prevent the contract from being considered *nudum pactum*, and that from the value of the cotton in Charleston was to be deducted the entire freight from Laurens, the point of shipment, to Charleston, and no deduction should be made for factor's commissions on the sale, the goods being consigned to a factor for sale, and that interest from the time of notice of the loss given to and payment demanded from the defendant should be allowed the plaintiffs. The verdicts being for the plaintiffs, the defendant appealed, and now moves for a new trial. The other facts are stated in the opinion.

Sullivan, for the appellant.

Simpson, contra.

By Court, O'NEALL, J. The three first grounds really make the same question, Was the defendant liable for the cotton lost after it reached the Greenville and Columbia railroad, and before it

reached its destination, Charleston? That the Laurens Railroad Company was liable is, I think, plain from the receipts, whereby it plainly undertook for the delivery of the cotton in Charleston. The cases were in this respect like the case of *Lipford v. Charlotte and South Carolina R. R. Co.*, 7 Rich. L. 409. In that case the company undertook for the delivery of the cotton in Charleston; and was only saved from liability for a loss, arising from the delay in reaching Charleston, by showing that the South Carolina railroad was broken up by a freshet, the act of God.

The case of *Muschamp v. Lancaster etc. R. R. Co.*, 2 Railw. Cas. 607, states, I think, the true rule. There a box was delivered to the company, directed to a place beyond the terminus of the company's railway; and it was held by Rolfe, B., to be liable for a loss, although the box reached Preston, the terminus, and there another took it up to transport it to its destination.

The rule was laid down in that case, by Rolfe, that where a carrier takes a parcel directed to a particular place, and does not by particular agreement limit his responsibility to a part, it is *prima facie* evidence of an undertaking to carry to the place, though beyond the limits of his trade as a carrier; and therefore, that he is liable for a loss occurring even beyond his limit. This ruling was approved on appeal by Lord Abinger, C. B., Gurney and Rolfe, barons.

The same principle is recognized by the cases cited by the defendant in the brief. Indeed, the supreme court of New York, by Nelson, C. J., in the case of *St. John v. Van Santvoord*, 25 Wend. 660, held that the carrier was liable for a box directed to J. Petrie, Little Falls, Herkimer, and which the defendants received to be transported, on their tow-boats on the Hudson, which only ran to Albany, and the box reached Albany safely, but was lost beyond. The chief justice said perhaps a usage of trade might limit their responsibility. The case was carried to the court of errors, and it was there held that it was shown that the usage of trade was to deliver at Albany to the canal line to transport to the place of destination, and this limited the liability of the defendants to their terminus.

The same ruling is repeated in *Farmers' and Mechanics' Bank v. Champlain T. Co.*, 18 Vt. 140. It would be enough to say, Concede all which those cases ruled, and still the defendant cannot be helped; for no usage of trade was proved that the Laurens Railroad Company should deliver to the Greenville and Columbia Railroad Company at Newberry. It was true, the freight

list was there turned over, but the cotton went on in the Laurens railroad cars without bulk being broken. This looked more like the Greenville and Columbia Railroad Company stood in the character of employee to the Laurens Railroad Company than as liable to the consignor. But in all the cases decided in New York, Vermont, and Connecticut, there was a mere direction of the parcel to a point beyond the carrier's trade. Here the carrier especially undertakes, on the presentation of the receipts given for the cotton, that it should be delivered in Charleston. This, it seems to me, ends all pretense which might arise under an implied undertaking from a mere direction. As to the notion of *nudum pactum*, the report sufficiently answers it.

Two questions arise out of the fourth ground: 1. Was the company liable for interest on the net value of the cotton? 2. Was the company entitled to deduct commissions on the value of the cotton, as if sold?

Interest was, I think, properly allowed. The cotton lost was a cash article at the place of delivery; its value was estimated on a cash sale, so that the plaintiffs' loss was, respectively, as of so much cash; hence interest must be charged against the carrier by whom the loss was occasioned. I regard a carrier in the light of an insurer against everything except the act of God and the enemies of the country. In 2 Phillips on Ins. 750, 751, we are told the practice is to allow interest against the insurers on the loss from the time of abandonment, or perhaps, more properly speaking, from notice of the abandonment, and demand of payment, or after the expiration limited by the policy for payment to be made. The interest here was computed from the time of demand of payment.

The answer to the second question cannot, I think, be well doubted after it is properly considered. The carrier in ordinary cases has no right to commissions. If, as in the case of *Bridge v. Austin*, 4 Mass. 115, he undertook to transport and sell, and for so doing, then, he was to have five per cent commissions, it may well be in the case of a loss he would have the right to deduct the commissions; for they were a part of his compensation for his service touching the article lost. But in these cases the carrier had nothing to do but to deliver in Charleston. If a factor might there have sold, it was a matter in which the Laurens Railroad Company had no interest whatever.

To illustrate the matter still further, suppose the cotton had reached the Charleston depot, and the carrier had refused to deliver, and trover had been brought, what would have been the

plaintiffs' damages? The value of the article, deducting the freight, and adding interest on the net value. In such a case, commissions could not have been talked about. How, in any case, can any deduction be made for that which was to be subsequent to the carrier's discharge of liability, by delivering the parcel? The authorities are, I think, clear against such allowance. Sedgwick on Damages, c. 13, p. 369, tells us that the rule whereby the damages are fixed is a rule of law. At pages 370, 371, he tells us the rule as to carriers is the value of the article lost, or not delivered at the place of destination, deducting his freight. The same is substantially the ruling in *Gillingham v. Demsey*, 12 Serg. & R. 183.

The motions are dismissed.

WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motions dismissed.

COMMON CARRIER'S LIABILITY FOR LOSS OF GOODS BEYOND TERMINUS, UPON CONNECTING LINE: See note to *Fitchburg etc. R. R. v. Hanna*, 66 Am. Dec. 430, and other cases in this series there collected. The principal case is cited in *Wheeler v. San Francisco etc. R. R.*, 31 Cal. 53, to the point that the receipt of goods destined beyond the terminus of the particular railroad, and accepting the carriage through, and giving a through ticket or check, imports an undertaking to carry through, and that such contract is binding on the company.

BANK v. KNOTTS.

[10 RICHARDSON'S LAW, 543.]

STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN IN FAVOR OF GUARANTOR UPON CONTINUING GUARANTY until there is a default in payment by the principal, and a full and complete cause of action has accrued against the guarantor.

GUARANTOR UPON CONTINUING GUARANTY IS NOT ENTITLED TO NOTICE OF DEFAULT in payment by principal, where he is not prejudiced by the want of it; he stands upon the same footing as any other surety, and his liability is not determined upon the principles applicable to negotiable instruments.

INTEREST SHOULD BE ALLOWED ON SUM GUARANTEED FROM TIME OF DEFAULT IN ITS PAYMENT, notwithstanding the suit be against the guarantor only.

ASSUMPSIT upon a written guaranty by the defendant with three others, which guaranty was accepted October 28, 1847, and guaranteed the payment of all drafts or notes made or to

be made by Glovers & Davis, and by its terms declared to be a continuing guaranty, to be revoked only by written notice, with liability thereunder limited to five thousand dollars. Glovers & Davis defaulted in the payment of more than five thousand dollars, so guaranteed, on October 1, 1852. The writ was lodged February 9, 1854, and the statute of limitations was pleaded, the declaration setting out the guaranty, but alleging no new promise. The court below overruled the plea of the statute of limitations, and instructed the jury that in finding for the plaintiffs, interest on the sum should be allowed from the time of default of Glovers & Davis, October 1, 1852. The verdict was for the plaintiffs for five thousand dollars, and interest according to the instructions of the court. The defendant appealed, and renewed his motion for a nonsuit, and also moved for a new trial. The other facts are stated in the opinion.

Bauskett, for the appellant.

Hayne, contra.

By Court, Munro, J. The ground for a nonsuit is that the plaintiffs' cause of action was barred by the statute of limitations.

To determine this, it is necessary to look: 1. To the character of the instrument sued on; 2. To the time when the plaintiffs' cause of action accrued.

The instrument sued on is declared upon its face to be a continuing guaranty, and that it is to remain of force till revoked by written notice to the president or cashier of said bank.

It appears from the circuit report that the guaranty was accepted by the plaintiffs on the twenty-eighth of October, 1847, from which time, and upon the faith of which, Glovers & Davis procured from the plaintiffs extensive accommodations; all of which appears to have been promptly met by them up to the period of their failure in 1852, when they failed to pay the notes, which the plaintiffs are now seeking to recover under the defendant's guaranty. Chitty, in his treatise on contracts, p. 435, defines a contract of guaranty to be "a collateral engagement to answer for the debt, default, or miscarriage of another, as distinguished from an original agreement for the party's own act. It is therefore of the essence of this contract that there must be some one liable as principal, and accordingly, when one party agrees to become responsible for another, the former incurs no obligation as surety if no valid claim ever arises against the principal; whilst on the other hand, the lia-

bility of the surety upon the claim, which is good as against the principal, ceases so soon as such claim is extinguished."

It is argued that the statute of limitations commenced to run from the time the guaranty was accepted by the plaintiffs.

But it is obvious that such a position can only be sustained by confounding the collateral undertaking of a surety for the debt, or default of his principal, with an original undertaking for his own act; for until the plaintiffs were damnified by Glovers & Davis's failure to meet their engagements at maturity, it is clear that the plaintiffs had no right of action, even as against the principals, much less against the defendant as their surety—so that in no point of view can the defense of the statute be sustained; for no principle is better established than this: that the statute of limitations does not begin to operate from the time when a contract is actually made, unless a full and complete cause of action instantly accrue thereon; and again: "In case of a contract of indemnity, the statute does not apply until the lapse of four years from the actual damnification."

The ground for a new trial charges error in instructing the jury that the bank was not bound to notify the defendant of the default in payment by Glovers & Davis.

The position here assumed is, that the want of notice of default in payment by the principal is a virtual abandonment of recourse against the surety, upon the principle applicable to negotiable instruments.

But it is clear that the analogy does not hold good, for in no sense of the term is a guaranty such as the one in question a negotiable instrument; on the contrary, the legal relation that is created between the principal and the maker by this species of contract is that of principal and surety; so that the guarantor stands upon the footing of any other surety, and is therefore only entitled to notice when he may be prejudiced by the want of it. See 3 Kent's Com. 166, where, in treating of guaranties, the rule is thus stated: "The rule is not so strict as in the case of mere negotiable paper, and the neglect to give notice must have produced some loss or prejudice to the guarantor." See also Ch. Bills, 324; Story on Bills, 302, 372; *Douglass v. Reynolds*, 7 Pet. 113; *Bank v. Hammond*, 1 Rich. L. 281.

The motions for a nonsuit and for a new trial are therefore dismissed.

O'NEALL, WARDLAW, and WITHERS, JJ., concurred.

Motions dismissed.

GUARANTOR WHETHER ENTITLED TO NOTICE OF PRINCIPAL'S DEFAULT.— In continuing guaranties, see *Lane v. Levillian*, 37 Am. Dec. 769; *Lowe v. Beckwith*, 58 Id. 659; note to *Beebe v. Dudley*, 59 Id. 345; in guaranties generally, see *Whiton v. Meara*, 45 Id. 233; *Mathews v. Chrisman*, 51 Id. 124; *Beebe v. Dudley*, 59 Id. 341, and the notes thereto; note to *Menard v. Scudder*, 56 Id. 619.

LANDRUM v. HATCHER.

[11 RICHARDSON'S LAW, 54.]

LANDS ACQUIRED AFTER MAKING OF WILL DO NOT PASS THEREBY, under the South Carolina act of 1791, unless there has been a subsequent republication of the will, but they descend to the heir at law.

LANDS BID OFF AT SHERIFF'S SALE ARE DEVISABLE AND DESCENDIBLE AS REAL ESTATE, and the sheriff's deed should be made to the heir at law of the purchaser in case of his death prior to the completion of the purchase, and not to the legatee or devisee under a will made before the purchase; nor does the payment of the purchase money by the testator's executor change the rule.

HEIR AT LAW IS ENTITLED TO HAVE LAND PAID FOR OUT OF BEQUEATHED PERSONAL PROPERTY, when the testator, after making his will, bids off the land at sheriff's sale, and dies before paying for the same.

DEFENDANT IN EXECUTION IS NOT ESTOPPED FROM DENYING SHERIFF'S DEED, where it is made to one who was neither a purchaser at the sale, nor his assignee, devisee, or heir.

TRESPASS to try the title to certain lands bid off by Christian Breithaupt at a sheriff's sale under an execution against the defendant. Breithaupt had made his will prior to the sale, and died before paying for the land, and without republishing his will. By his will the residue of his estate was directed to be sold and the proceeds distributed among certain relatives in Germany. Breithaupt's executor paid for the land, and directed the sheriff to convey it to the plaintiff, according to instructions from these residuary legatees, and the deed was accordingly made by the sheriff. The court granted a nonsuit, on the ground that Breithaupt's interest in the land was an equitable one, and having been acquired after the making of the will, did not pass under it, but went to the heir at law, and the executor had no power over the land. The plaintiff appealed, and moved to set aside the nonsuit and for a new trial.

Bauskett, for the appellant.

Carroll, contra.

By Court, WHITNER, J. This court is of opinion the nonsuit was properly ordered by the circuit judge. The views

suggested in the report are such as meet with approval, and in delivering the judgment of this court I shall only attempt briefly to enforce and sustain them by authority. By our act of 1791, lands acquired after making a will do not pass thereby, unless there has been a subsequent republication: 7 Stata. 163. It is conceded, therefore, that if a deed had been executed by the sheriff to Christian Breithaupt, neither his executor nor devisee could have maintained this action. The act of assembly, 1791, embraced both lands and personal estate, though by the act of assembly, 1808, this restriction as to personalty was removed, and upon this branch of the case the inquiry is as to which class the interest of Breithaupt in these lands belonged. It is correctly denominated by the circuit judge an equitable interest. Mr. Story, in his Equity Jurisprudence, section 1212, says this belongs to a class of cases embracing what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible, and descendible, according to its new character. Thus, says the author in continuation, where a contract is made for the sale of land, the vendor is in equity immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate.

The equitable interest, therefore, in question, if it had been acquired before the will was made, would have passed by the devise, but being acquired after, and there being no republication, descended to the heir. The general rule, as stated in Ch. Cont. 308, is that the heir or devisee, and not the personal representative, must sue on a contract relating to freehold property. In such a contract as this, a specific performance must have been asked by the heir at law.

It is supposed that the payment of a portion of the purchase money by the executor may make a difference, but it is not perceived. If the purchaser of real estate dies without having paid the purchase money, his heir at law or devisee of the land purchased, as the case may be, will be entitled to have the land paid for by the administrator or executor: 2 Williams on Executors, 1499; *Broome v. Monck*, 10 Ves. 597. In this case, therefore, Christian Breithaupt having died intestate as to the land, the heir at law to whom it descended was entitled to have it discharged of the debt, and to have a title deed from the

sheriff. But it is insisted that the sheriff has actually made a deed to the land in question, and the defendant cannot gainsay or dispute this title. But whose title may he not dispute, and why not? The purchaser or any one claiming under him, and because such person is regarded as having the title of the defendant himself, and that he may not dispute, however imperfect.

It has never been held that he may not resist a stranger. This plaintiff is neither the purchaser from, nor assignee, devisee, or heir at law of, Breithaupt. He has a sheriff's deed; but by what authority? It is said the sheriff was the agent of the defendant, but is this correct for any such purpose? The sheriff may be by law and for certain purposes the agent of both plaintiff and defendant. That is an agency well defined, and as to this transaction the act of the legislature must be pursued. The sheriff is authorized to convey to the purchaser, and looking to the object of the law, our courts have recognized conveyances to his assignee, devisee, or heir.

The alleged authority from the executor cannot mend the matter, as this has been shown to be a case of partial intestacy. It is not analogous to the case of *McElmurray v. Ardis*, 3 Strobb. L. 212. In that case there was a will before the interest accrued, and whilst the judge delivering the opinion held that generally the titles should be executed to the party having the legal estate, adds, but if made to the devisee, the land was subject to a trust confided to the executor for the payment of debts. The motion to set aside the nonsuit and to grant a new trial is refused.

O'NEALL, WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

AFTER-ACQUIRED LANDS, WHETHER AND WHEN PASS BY WILL: See *Wynne's Lessee v. Wynne*, 58 Am. Dec. 66, and note collecting prior cases; *Bowen v. Johnson*, 61 Id. 110. A codicil republishes a will so as to pass to the residuary devisee lands purchased by the testator between the times of making the will and the codicil: *Drayton v. Roe*, 64 Id. 731.

EQUITABLE ESTATES ARE GOVERNED BY SAME RULES AS LEGAL ESTATES, AS REGARDS PASSING OF AFTER-ACQUIRED LANDS BY WILL: *Meador v. Soreby*, 36 Am. Dec. 432.

SHERIFF'S DEED IS CONCLUSIVE EVIDENCE of the right of possession in the purchaser against the defendant in execution, and all claiming under him after judgment: *Hale v. Hewie*, 27 Am. Dec. 289.

LEGER v. DOYLE.

[11 RICHARDSON'S LAW, 109.]

SALE OF LAND BY SHERIFF UNDER LEVY MADE FOUR YEARS PREVIOUSLY BY PREDECESSOR IN OFFICE IS VALID.

SHERIFF IS NOT PROHIBITED FROM PURCHASING LAND AFTER EXPIRATION OF HIS TERM OF OFFICE, even though it is sold under a levy made by himself while in office; such a purchase is not contrary to the letter nor reason of the statutes passed to prevent a sheriff from buying directly or indirectly at his own sale.

REGULARITY IN PROCEEDINGS LEADING UP TO SHERIFF'S SALE WILL BE PRESUMED, in the absence of proof to the contrary.

DECLARATIONS OF PERSON IN POSSESSION OF LAND ARE ADMISSIBLE to show that his possession was not adverse; and the want of an adverse character to his possession which prevents acquisition of title by the statute of limitations is sufficient to rebut the presumption of a conveyance which the lapse of twenty years' possession might raise.

UNRECORDED SHERIFF'S DEED OTHERWISE VALID AGAINST DEBTOR IS VALID AGAINST HIM and all the world, except such creditors and purchasers as are protected by the registry acts, notwithstanding the debtor remained in possession thereafter for twenty years; and when the deed is recorded, it is not liable to be defeated for previous neglect of any prescribed time for registering by rights subsequently acquired.

TITLE TO LAND SOLD UNDER EXECUTION REMAINS IN EXECUTION DEFENDANT until delivery of conveyance to the purchaser; and the conveyance when delivered does not relate back to the time of the sale; the interest acquired by the purchaser is only such an equitable interest as exists under every contract to buy.

PAROL CONTRACTS TO BUY LAND, WHETHER WRITTEN OR UNWRITTEN, ARE NOT EMBRACED within the South Carolina registry acts.

REGISTRATION OF DEED MADE AFTER TIME PRESCRIBED IN REGISTRY ACT TAKES EFFECT AS NOTICE from the date of registration, and does not relate back to the day of delivery, but gives to the deed priority over all conveyances made subsequent to the registration.

PREVIOUS CONVEYANCE REGISTERED IN INTERVAL BETWEEN EXECUTION SALE AND CONVEYANCE BY SHERIFF supersedes the sheriff's deed; even though it was not registered within the time prescribed by the registry act.

TRESPASS to try the title to land claimed by the plaintiff under a sheriff's deed made and delivered in 1850, upon a sale made in 1848, on an execution against Daniel Doyle, the father of the defendant. The defendant claimed by title from his father by two deeds made by one Ingram, sheriff, one to Peter C. Coggeshall, for a portion of the land in dispute, dated in 1829, upon an execution sale made in 1826, in pursuance of a levy made in 1822 by one Bacot, the former sheriff. The deed to Coggeshall was not recorded until in 1849, between the date of the sale by

the sheriff to the plaintiff and the delivery of the deed to her. The other sheriff's deed, conveying the remainder of the land in dispute, was made in 1832 to said Bacot, upon an execution sale made to him in 1826, in pursuance of a levy made by him while sheriff in 1822 at the same time as the other levy. This latter deed was recorded within six months from its delivery, as required by the registry acts. Notwithstanding these sales, Daniel Doyle, the father of the defendant, continued to reside on the lands in dispute until his death, some time after the plaintiff obtained her deed. The defendant also resided on and cultivated this same land with his father during all the time from 1822 up to the present time, and as far as the observation of others went, the father and son seemed to treat the land as common property. On the trial, the plaintiff, for the purpose of showing that Daniel, the father, had reacquired title as against both purchasers from Ingram, by adverse possession, was allowed to give in evidence declarations of his in favor of his own title, and also certain declarations of the defendant on three occasions, once saying that the land was his father's; again that the line of a railroad divided his father's from a neighbor's land; and a third time, after a quarrel with his father, that he had cloaked that property long enough. It also appeared that at various times the father was greatly embarrassed by executions. On the part of the defendant, many declarations of the father were introduced denying title or claim of title to the land in himself, and also it was shown that in 1838 a case was pending against the father, by the heirs at law of Bacot, involving the portion of the property bought by Bacot at the sheriff's sale, and that this case was compromised and a paper executed between Bacot's administrator and Doyle, the father, whereby the latter agreed to pay on or before a day in 1841 a sum certain for the land, and the administrator agreed to convey the same to the defendant and his brother, the father stipulating at the same time that he had no title to the land, except what was expected to be derived from this agreement. Some payments were made by the defendant on this agreement. It was also shown that in 1832 Coggeshall conveyed the portion which he had purchased at the sheriff's sale to one Ruffin, and the latter conveyed the same to the defendant and his two brothers the same year, but neither of the deeds was recorded. The question of adverse possession was submitted to the jury, and the verdict was for the defendant. The plaintiff appealed, and now moves for a new trial.

Spain and Norwood, for the appellant.

Moses and Inglis, contra.

By Court, WARDLAW, J. This court approves the circuit decisions, which have been brought under review here.

The sale by Ingram, sheriff, under a levy made four years before by Bacot, his predecessor in office, is sustained by the authority of the case of *Gassoway v. Hall*, 3 Hill (S. C.), 289.

The purchase by Bacot after the expiration of his term of office from Sheriff Ingram of land sold under a levy which Bacot, when sheriff, had made, was not contrary to the letter or the reason of any statute which has been passed in this state to prevent a sheriff from buying directly or indirectly at his own sale: See Act of 1839, 11 Stats. 38, sec. 59; Act of 1823, 6 Stats. 213; Act of 1791, 7 Stats. 263, sec. 8. The regular turning over of the execution by Bacot to his successor, and the regular sale by Ingram at a proper time and place, will, in the absence of proof to the contrary, be presumed.

The declarations of Daniel Doyle, made during his possession and before controversy, were admissible to show the character of his possession, upon the question whether it was adverse. As to actual fraud, which has been imputed, the verdict affords patent contradiction; but it is not unimportant to remark that the old executions against Daniel Doyle, which existed in 1826, may all, in the absence of any opposing evidence, be presumed to have been satisfied before the plaintiff obtained her judgment against him in 1849, and that no execution against him between these old ones and the plaintiff's was shown. Concerning the presumption of a conveyance from Coggeshall, or some person claiming under Coggeshall, to Daniel Doyle, which the lapse of twenty years, between the date of the conveyance to Coggeshall and the time of its registration, has been thought to raise, it may be remarked that the same want of adverse character in Daniel Doyle's possession, which prevented his acquisition of a title by the statute of limitations, also rebutted presumptions of title in him. The plaintiff claims under him, and can have no rights superior to those he had.

The main question in the case is that which relates to the registration of the deed of conveyance from Sheriff Ingram to Coggeshall, and this question affects only a portion of the land sued for.

Bacot, sheriff, levied in 1822; under this levy Ingram, sheriff, sold to Coggeshall in 1826; and under this sale a sheriff's title was executed and delivered to Coggeshall in 1829.

The plaintiff obtained her judgment in 1849; under it Sheriff Higgins, after levy, sold to the plaintiff November, 1849, and executed to her a sheriff's title in February, 1850. Between the sale to the plaintiff and the execution of the conveyance to her, to wit, December 17, 1849, the old conveyance to Coggeshall was registered. If that conveyance is valid, it shows a title out of the plaintiff, although subsequent conveyances under it have never been registered; and the plaintiff contends that if all other objections to this old conveyance shall prove unavailing, the registry acts will make it inefficient against her, a subsequent innocent purchaser without notice.

The questions thus presented under these acts are almost identical with those that were considered in the case of *Steel v. Mansell*, 6 Rich. L. 437, which was decided in the court of errors, and which we will suppose the readers of the remarks now to be subjoined have carefully examined. The distinctions between that case and this are: 1. That there the older deed was registered within four years from its date; here after twenty years from its date; 2. That there the registration of the older deed preceded the sheriff's sale under which the junior deed was made, though it followed the judgment under which that sale was made; but here the registration of the older deed was subsequent to the sheriff's sale, at which the plaintiff purchased, although it preceded the execution of the conveyance to her.

The first distinction we dismiss by simply suggesting, in addition to what has been before said about fraud and presumptions, the inquiry whether Daniel Doyle could, under the circumstances that existed, have resisted the deed to Coggeshall as obsolete, fraudulent, or otherwise void. If he could not, that deed, even without registration, was valid against him and all the world, except such creditors and purchasers as are protected by the registry acts; and when registered, was not afterwards liable to be defeated for previous neglect of any prescribed time by rights subsequently acquired by a purchaser.

The other distinction may seem at first to be more important. It is asked, Shall a purchaser at a sheriff's sale be defrauded by an old conveyance, of which he had no means of notice at the time of his purchase? And it is said if the contract to buy had been made with a private individual, a defect of title subsequently discovered might have been urged against the completion of the contract; but under the rule of *caveat emptor*, applicable to sheriff's sales, the purchaser at such a sale is obliged to pay his bid, and should be saved from the unjust defeat of his expectations by matter supervening his contract.

It might be answered that where the purchaser at a sheriff's sale is the plaintiff in execution to whom the proceeds of sale are payable, and the defendant in execution has contributed to the perpetuation of an actual fraud, by concealment of papers or other means, the purchaser would not be bound to give the defendant the benefit of the fraud by completing the bargain, which was made by his bid: See *Minter v. Dent*, 3 Rich. L. 207; *Herbemont v. Sharp*, 2 McCord, 264; *Towles v. Turner*, 3 Hill (S. C.), 182. But here actual fraud has not been found, and the bargain of the purchaser having been completed, she claims to have acquired a paramount title. By the sale, as it is called, she acquired no legal title, but only such equitable interest as exists under every contract to buy. The subsequent conveyance made to her by the sheriff would, if she had gone into possession before it, have shielded her from responsibility for mesne profits by relation back to the sale: *Kingman v. Glover*, 3 Rich. L. 86 [45 Am. Dec. 756]. For such would be the effect of any contract to buy under which possession was held, where there was a right to claim immediate execution of the contract, and execution followed. But up to the very time when a conveyance is delivered by the sheriff to one who has purchased land at a sheriff's sale, the title, which the defendant in execution had at the sale, remains in such defendant, the power to convey which the law vests in the sheriff being yet unexecuted: *Bank v. S. C. Man. Co.*, 3 Strobb. 192 [49 Am. Dec. 640]. The registry acts embrace deeds and conveyances, not parol contracts to buy, written or unwritten; and a sheriff's conveyance is subject to the provisions of those acts in like manner as a conveyance from a private individual: *Massey v. Thompson*, 2 Nott & M. 105. If an honest conveyance, made by a debtor before judgment against him, should be registered at some time within six months from its delivery, in vain would a subsequent purchaser oppose to it his rights as purchaser without notice, even although he had purchased at sheriff's sale under a judgment obtained after its delivery, and the conveyance to him, as well as the sale, had preceded its registration. The registration in such case would, under the act of 1785, relate back to the day of delivery, because it was made within the prescribed time. The registration of the old deed now in question, not having been made within the prescribed time, can have no relation back; but taking effect only at the time it was made, it then became notice, and gives to the deed priority over all conveyances subsequently made.

If the plaintiff had paid her bid, by giving a receipt to the

sheriff or otherwise, and had taken the conveyance from him on the day of sale, she could not have been hurt by the registration within six months thereafter, of any conveyance not executed within the six months next preceding, provided the conveyance to herself had been duly registered within six months. To her own tardiness, rather than to the slowly exerted diligence of somebody claiming under the conveyance to Coggeshall, is to be ascribed the priority which that conveyance has obtained. The law contemplates the sale by the sheriff, the payment of the purchase money, and the conveyance to the purchaser as one continuous transaction; interruption and delay cause embarrassment and irregularity, but they are so frequent that various special provisions have been made to meet them. This case, however, illustrates forcibly the danger to a purchaser which attends them. The same result might possibly have happened if the delay had been only for an hour; so any subsequent conveyance might possibly be defeated by a prior one registered within six months from its execution and within an hour intervening between a search in the register's office and the execution of the subsequent one—or, in any case, where the order of precedence is fixed in conformity with the order of registration, a very short interval of time might be decisive of conflicting rights; but in every case the risk is increased in proportion as the time is extended. Here the plaintiff delayed only six weeks; but if that comparatively short interval between the sheriff's sale and his conveyance shall be disregarded, and the plaintiff be protected against occurrences of the mean time, what shall be the limit of the like indulgence in other cases? The legislature has allowed sheriffs and their successors, for an indefinite time, to complete the contracts made at their sales. If we do not invariably look to the conveyance, and that only, as the transfer of title, without regard to the time of the contract, we will in effect enact that the conveyance is only formal, and that all its important uses may be served before it is made. The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

DECLARATIONS OF PERSON IN POSSESSION OF LAND ARE ADMISSIBLE TO SHOW CHARACTER OF HIS POSSESSION: See the notes to *Marcy v. Stone*, 54 Am. Dec. 741; and *Nelson v. Iverson*, 60 Id. 449. Declarations as evidence, generally: See *Printup v. Mitchell*, 63 Id. 258, and other cases collected in the note.

UNRECORDED DEED, DULY EXECUTED AND DELIVERED, PASSES TITLE: *Philips v. Green*, 13 Am. Dec. 124; but if not recorded within the time prescribed by statute, is void as to creditors: *Harvey v. Alexander*, 10 Id. 519. If a purchaser fails to record his deed until after a judgment has been recovered against his grantor, but does so before sale under the judgment, his deed takes precedence of the sheriff's deed: *Davis v. Ownby*, 55 Id. 105, and note; but see *Shepherd v. Burkhalter*, 58 Id. 523.

McCoy v. LEMON.

[11 RICHARDSON'S LAW, 165.]

POWER OF COURT TO INCREASE DAMAGES, *SUPER VISUM VULNERIS*, IN CASES OF MAYHEM, DOES NOT EXIST in South Carolina, however such power may have existed at the common law.

DAMAGES ARE TO BE ASSESSED BY JURY UNDER AUTHORITY OF COURT, and not by the court independently of the jury, in all cases sounding in damages. In all instances of vindictive damages, or where there is no rule of law regulating the assessment of damages, the judgment of the jury, and not the opinion of the court, is to govern.

TRESPASS for assault and battery and mayhem. The facts are stated in the opinion.

Spain and J. S. G. Richardson, for the appellant.

Blanding, contra.

By Court, WHITNER, J. The merits of this case, as presented on circuit, are in no way involved by the present motion.

The battery of which the plaintiff complained had occasioned the loss of an eye, and the jury returned a verdict for thirty dollars. This appeal rests on the refusal of the judge on circuit to increase the damages, after verdict, on motion of plaintiff's counsel, *super visum vulneris*.

This court has been urged by a very learned and ingenious argument to administer a remedy never, so far as we are informed, adopted by the courts in this country. Not a single case has been found in any book of American reports in support of the present motion, notwithstanding the great research displayed by counsel. Neither has there been, for a period of more than a century, any recognition of the rule by any adjudged case in England to which we have been able to procure access. It is true, modern text-writers, in brief paragraphs, allude to this peculiarity as appertaining to the action of mayhem; and Mr. Christian, in a note, 3 Bla. Com. 121, states the point fully, that "a remarkable property peculiar to the action for a mayhem is deemed to exist, viz., that the court in which

the action is brought have a discretionary power to increase the damages, if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*, and upon proof that it is the same wound concerning which evidence was given to the jury." The same principle is stated in Bull. N. P. 21, and Steph. N. P. 225, each deriving authority from the same sources.

Whatever reason may have existed heretofore to justify this peculiarity, in cases sounding in damages, we would be wholly at fault to deduce a rule at all consistent with modern practice. In the last case at Lent assizes, in 1742, and referred to by Christian, *Brown v. Seymour*, 1 Wils. 5, the application was refused, though the judge said there was no doubt of the rule. In the case of *Cook v. Beal*, 1 Raym. 176, I think in 1696, the court resolved: 1. "That if a wound be apparent, though not a mayhem, an eye injured, not out, but wound visible;" 2. "For loss of nose, though not a mayhem;" or 3. "If a grievous wound"—the court may increase the damages. In *Smallpiece v. Bockenham*, referred to in Buller, it seems witnesses and jury-men were examined, who all said that no evidence was given that any blow had been inflicted upon the eye, or that the party had lost an eye by the battery; and for this reason the court would not increase the damages, "for new evidence ought not to be given, for this is a censure on the first verdict and a correction of it."

The question before the court is one purely of damages; and by what standard could a judge remodel the verdict? Under the Mosaic law there was a rule: "Eye for eye, tooth for tooth, hand for hand, foot for foot;" but under our present dispensation no such law of retaliation prevails. The legitimate object of the proceedings in our courts of justice is at once to make reparation to the injured party, and to deter others from the like. We have no standard value of an eye; and hence, according to the cases in awarding damages, there must be consideration of the nature, quality, and degree of the wrong done. For centuries the wit of jurists has been taxed to settle the province of judges and juries; and though not yet clearly defined in every conceivable case, much progress has been made. Damages, strictly speaking, are a compensation given by the jury for an injury or wrong sustained by the complaining party before action brought: 1 Co. Lit. 257. The *quantum* of damages, being in most cases intimately blended with questions of fact, must have been generally left with the jury: Sedgwick on

Damages, 21; but, says the same author, the limits of their power were not at first as clearly defined as they have become in later days. In this course of development, we find, in 1 Rolle's Abr., p. 703, it said: "The jury are chancellors, and they can give such damages as the case requires in equity." Whilst again it is said: "The old books are full of cases where, on judgment by default, and even on demurrer, the court themselves fix the amount of damages, and the remains of this is seen in the power exercised by the English courts in cases of mayhem."

Other facts appear in our judicial history illustrating the point under consideration, as we trace the gradual establishment of our practice as settled at this day.

In the earlier cases the courts refused to interfere in granting new trials on account of excessive damages: *Townshend v. Hughes*, 2 Mod. 150; *Ash v. Ash*, Comb. 357; or for smallness of damages: *Hayward v. Newton*, 2 Stra. 940; though in each a different rule obtained, sparingly exercised: *Ducker v. Wood*, 1 T. R. 277; *Pleydell v. Earl of Dorchester*, 7 Id. 529; *Donelly v. Baker*, Barnes, 154; 2 Tidd's Pr. 916.

The constitutions adopted by the different states of this Union, as well as the whole current of legislation and adjudication, demonstrate the great jealousy of the American people on the subject of jury trial. So universally regarded as a great palladium in England and America, we may well be cautious of any innovation, though the same sentiment should equally guard the improvement which time and experience have ingrafted on our judicial proceedings. Our reverence for the common law must have its just limit, and we may well hesitate to adopt any principle not recognized for the past hundred years. The trial by jury has taken the place of other forms once in favor, and the judgment of a panel of twelve men has been incorporated as an indispensable element in the judicial administration of the country.

Our notions may well be pronounced inveterate as to this mode of securing rights and redressing wrongs.

At this day we may lay it down as settled that in all cases sounding in damages, these damages are to be assessed by the jury under the authority of the court, and not by the court independently of the jury; and in all cases of vindictive damages, the amount must depend on the sound discretion of the jury. Hence, according to a series of adjudged cases, where there is no rule of law regulating the assessment of damages, and the

amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern. The principle is familiar, and scarcely needs a reference: *Worster v. Canal Bridge*, 16 Pick. 541; *Stone v. Kelland*, 1 Wash. C. C. 142; *Harvey v. Huggins*, 2 Bail. L. 252; *Park v. Hopkins*, Id. 408.

This rule in no way conflicts with the practice of again submitting a case to the judgment of another jury in extreme cases, when the verdict is extravagant or trifling.

The question therefore recurs in such a case as the present, What legal rule exists whereby to measure the damages and dispense with the judgment and sound discretion of a jury? However conclusive the argument of counsel on the subject of the transfer of certain powers exercised and distributed by the courts of England to the law judge in South Carolina, and however a court organized as ours and charged with the administration of the common law might have been impressed a century ago by the doctrines and authorities now urged and relied upon, yet, looking as we must to the long sleep into which this practice, as best not very clearly defined, has fallen in the mother country, and still more to the fact that it has never been transplanted in our soil, and is now wholly incongruous with our usages and institutions, this court has not seen its way to the conclusion urged. Other and better rules of practice, efficient and satisfactory, have been adopted, in committing that class of cases sounding in damages to the jury under the supervision of the court, and relying on the proper corrective against mistake, ignorance, prejudice, and caprice, by granting new trials when the damages are excessive or nominal. I may add that it would be hazardous, inconvenient, and to some extent subversive of our judicial machinery, to attempt this retrograde, and perhaps would justly subject this court to a charge of judicial usurpation.

The motion to increase the damages is refused.

O'NEALL, WARDLAW, WITHERS, GLOVER, and MUNRO, JJ., concurred.

Motion refused.

AMOUNT OF DAMAGES IS DISCRETIONARY WITH JURY where there is no certain criterion to regulate the verdict: *Bishop v. Mayor etc. of Macon*, 50 Am. Dec. 400.

ALLOWANCE OF EXEMPLARY DAMAGES: See *Austin v. Wilson*, 50 Am. Dec. 766, and note, where the question is discussed at length; also *Rowe v. Moses*, 67 Id. 560, and note considering the subject of the pecuniary circumstances of the parties as affecting the measure of damages.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

WALLACE v. CANADAY.

[4 SNEED, 364.]

PUBLIC MILLERS ARE HELD TO VERY GREAT DEGREE OF CARE AND DILIGENCE in safely preserving materials delivered to them to be ground; but their liability is not as extensive as is an innkeeper's or common carrier's. If in the exercise of such care as from the nature of the case is thought necessary for its preservation the grist is lost, without the imprudence, negligence, or fault of the miller, he will not be liable. This class of bailment is known as *locatio operis faciendi*.

MILLER'S LIABILITY FOR GRAIN DELIVERED TO HIM TO BE GROUND CONTINUES until it is so ground and returned to its owner. If the owner's servant is present while the grain is being ground, assisting in the work, and places a sack of the grist in a place from which it is stolen, the miller is not relieved from his liability, as the servant while so acting was not the agent of his master, but of the miller.

APPEAL from Obion county. The opinion states the facts.

Cochran and Enloe, for the plaintiff in error.

Davis, for the defendant in error.

By Court, **HARRIS, J.** The defendant in error brought this suit before a justice of the peace to recover the value of a sack of flour, which was lost at the mill of the plaintiff in error. The justice gave judgment for the plaintiff; the defendant appealed to the circuit court, where the plaintiff again recovered. A new trial was refused, and the defendant prosecutes a writ of error to this court.

The bill of exceptions shows that the plaintiff introduced as a witness E. Kirk, who testified that "he was at defendant's mill when the plaintiff's negro boy came to the mill with a load of

grain; the negro brought the bags of grain into the mill; that a bag of the plaintiff's wheat, containing about two and one half bushels, was ground and the flour put up, and the negro set the bag aside with the bags of witness, apart from the other bags in the mill. When the boy got ready to leave, said bag of flour was gone, and when witness left, it had not been found; that he saw no want of care and attention in relation to said bag of flour on the part of the miller." The value of the wheat and bag was proved, and that defendant was a public miller, who ground for toll.

The court charged the jury "that if the plaintiff's wheat was carried to the defendant's mill to be ground, the defendant was bound to return it, and would be liable to pay for it if it was lost by theft, unless such theft was committed by overpowering force; that a miller is bound to use extraordinary diligence in preserving the grain sent to his mill from loss." It is insisted for the plaintiff in error that this charge is erroneous; that a public miller is only bound to use ordinary diligence.

The general rule is, that where the bailment was for the mutual benefit of both parties, then the bailee is only bound to ordinary diligence—"such as a person of ordinary care and prudence takes of his own concerns." But it by no means follows that in every case where the bailment is for the mutual benefit of both parties the bailee is only bound to ordinary care. There are several exceptions to this rule. In the case of innkeepers and common carriers, it is manifest that the bailment is for the mutual benefit of both parties; but a very different principle prevails as to their liabilities. "Public policy imposes upon an innkeeper a very severe liability." "The prevailing authorities make him an insurer of the property committed to his care against everything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property:" See 1 Parsons on Cont. 624; 2 Kent's Com. 459; *Mason v. Thompson*, 9 Pick. 280 [20 Am. Dec. 471]; *Richmond v. Smith*, 8 Barn. & Cress. 9; *Piper v. Manny*, 21 Wend. 282; *Grinnell v. Cook*, 3 Hill (N. Y.), 485 [38 Am. Dec. 663]; *Manning v. Wells*, 9 Humph. 746. This rule is equally stringent as to common carriers: See 1 Parsons on Cont. 634; 2 Kent's Com. 464.

This policy is founded on the principle of public utility, to which all private considerations must yield. Travelers are bound to rely almost implicitly on the good faith of innkeepers. Most of the commerce of the country, from necessity, is carried to market by common carriers. And it would be almost impos-

sible, in any given case, for the owner of property committed to their care to make out proof of fraud or negligence in the landlord or common carrier. The law, therefore, from motives of public policy, presumes against them, unless they can show that the injury resulted from the act of God, or the public enemy.

Were it not for this rule, innkeepers and common carriers might contrive, by means not to be detected, to commit breaches of trust, or be robbed of the goods committed to their care, in order to share the spoil: See 2 Kent's Com. 460. This stringent rule was applied by his honor the circuit judge to the case before us. And it is difficult to perceive, upon reason and sound policy, why it is not correct. Almost the entire breadstuffs consumed in this county are manufactured by public millers, and the owners of grain are as much bound to rely implicitly on their good faith as are the owners of goods committed to the care of innkeepers and common carriers. The small amount involved in this case makes it a matter of but little consequence, but the principle involved is one of practical importance.

Not only are our breadstuffs manufactured by public millers, but many of our smaller planters have their entire cotton crops prepared for market at public gins, which must, as we think, be governed by the same principles. The difficulty is in determining to what class of bailments the case belongs, and the degree of care required of public millers. We think, however, that the authorities place the case within a class where the rule is a little less stringent than that adopted by his honor.

Under the head of *locatio operis faciendi*, is embraced that class of bailments "where mechanics are employed to make up materials furnished, or to alter or repair a specific thing." It is true, it is said that "the contract is one of mutual benefit, and only ordinary care is required." But it is also said that "this care may vary much in different cases," according to the "nature of the thing and the circumstances:" 1 Parsons on Cont. 603, 610. "The obligations of workmen are, to do the work in a proper manner, to employ the materials furnished in the right way, and not only to guard against all ordinary hazards, but to use their best endeavors to protect the thing delivered to them against all peril or injury." But "if it perishes in their hands, without their fault, then the owner loses the property:" Id. 611. "If the loss occur through theft or robbery, or the injury result from violence, the bailee is only answerable when his imprudence or negligence caused or facilitated the injurious act:" Id. 606.

While we admit that reason and public policy would well warrant the holding of public millers to the same stringent liability that innkeepers and common carriers are held to, yet we think that the authorities place them in the class with "mechanics who are employed to make up materials furnished;" but we also think that from the "nature" of the bailment and the "circumstances," they should be held to the greatest degree of care and diligence.

But if, in the exercise of such care as is, from the nature of the case, thought necessary to prevent the grain or the flour from loss by destruction, theft, or being carried off through mistake, it should be lost by inevitable casualty, "without the imprudence, negligence, or fault" of the miller, then we think he should not be liable.

It results, therefore, that in that part of his honor's charge where he instructed the jury that if the plaintiff's grain "was lost by theft," the defendant would be liable to pay for it, "unless such theft was committed by overpowering force," he erred. The defendant is bound to use his best endeavors for its preservation; but he would not be liable, even in case of theft, unless he was guilty of some imprudence, negligence, or fault. And this should have been submitted to the jury. For this error the judgment will be reversed, and the cause remanded for another trial. It is also assumed in argument that the defendant is not liable because the slave of the plaintiff "set the bag of flour aside, apart from the other grain in the mill;" that he was the agent of the plaintiff, who thereby became possessed of his flour, and after that the defendant was not responsible for it.

To the correctness of this argument we cannot assent. It is the duty of a public miller to receive the grain brought to his mill, to deposit it in some place of safety, to grind it according to its turn, and to sack the meal or flour so as to have it in proper condition to carry away, and then to see that it is delivered in each case to the owner or his agent when he desires to remove it from the mill.

It is not the duty of the owner to aid in any part of this business; and if his slave, by whom he sent the grain to the mill, does so aid, he acts as the agent of the miller, and not the owner.

If the miller deliver the flour to the slave of the owner when he is ready to leave, and he carries it out of the mill, then he has lost his custody of and control over it, and he is discharged from liability, though the slave should afterwards be guilty of a breach of confidence, and convert it to his own use.

But the mere removing of the flour by the slave from one part of the mill to another, for the purpose of putting it out of the way of other grain, could have no such effect.

WHERE BAILEE HAS RIGHT TO RECEIVE COMPENSATION FOR HIS SERVICES, he is liable for a failure to exercise ordinary care: *Smith v. Nashua & L. R. R.*, 59 Am. Dec. 367. A discussion of this question is entered into in note to *Lockett v. Townsend*, 49 Id. 735.

PRITCHARD v. WALLACE.

[4 SHEED, 405.]

RESULTING TRUST ARISES IN FAVOR OF WIFE whose husband induces her to allow him to sell separate land of hers and to use the money thus derived to purchase other land with, where he takes the title in his own name. A court of equity will enforce the trust after his death against his heirs. Such a trust is not within any of the provisions of the statute of frauds, and may be established by parol.

APPEAL by complainants from a dismissal of their bill. The opinion states the facts.

M. and H. Brown, for the complainants.

Bullock and Scurlock, and L. M. Jones, for the defendants.

By Court, CARUTHERS, J. This bill is filed to set up a resulting trust in a tract of one thousand seven hundred acres of land in Decatur county, upon this state of facts: The complainant, Polly Pritchard, was the daughter of Samuel Smith, of Montgomery county, and, as one of his heirs and distributees, became entitled to a tract of land of some three hundred acres in that county, several slaves, and some money. She first married Francis Warden, who died, leaving several children, the other complainants in this bill. In the year 1844 or 1845 she intermarried with James Wallace, who died in August, 1852; and in 1853 she married her present husband, William Pritchard. In 1850 Wallace purchased the tract of land in question from Igleheart, at four thousand dollars, two down and the other in three equal annual payments. The title to the land was taken in his own name, and he settled on it soon after the purchase, and there died, leaving his family in possession. Recently a proceeding was instituted for a partition of the land among defendants as the collateral heirs, after assigning dower to the widow. Wallace settled the children of his wife, without title, upon various parts of the tract. He left no children at his death, and his widow became

entitled to his whole personal estate and dower in the land. It appears that his slaves and other property personal amounted to some twelve or fifteen thousand dollars in value. Some part of the consideration of the land yet remains to be paid.

But these facts do not affect the questions raised by this bill. It is filed to enjoin the partition proceedings, and to have declared her title to the whole tract of land, upon the ground that the money with which the cash payment was made was derived from the sale of her tract of land in Montgomery for one thousand one hundred dollars, and the remaining nine hundred dollars from her father's estate; and that she has paid, or is bound to pay, the other two thousand dollars out of her own property—that is, the property to which she is entitled by law as the widow of said Wallace. The bill charges that there was an express agreement and positive assurance on the part of her husband that the proceeds of her three hundred acres of land should be invested in lands for her and her children, and that this was the condition on which she agreed to sell it. It is also charged that the same agreement extended to all moneys derived from her father's estate in her right, and that the nine hundred dollars came from that source. As to the amount of this last item, the proof is very unsatisfactory and conflicting. The executor of Smith says he paid him only two hundred dollars on that account; but declarations of Wallace are proved going to show that one thousand nine hundred dollars, if not the whole of the first or cash payment, was made out of the proceeds of her land and other moneys received from her father's estate. But in the view we take of the case, it is not at all material how that was as to the amount. Whatever he may have received on that account became his own by virtue of his marital rights, and no trust could be raised against him, no matter what disposition he may have made of it. How that would be in a case where the wife had taken steps to secure her equity to a settlement out of it, or was prevented from doing so by a promise and agreement on the part of the husband to invest it for her benefit, need not now be determined, as no such case is presented in this record. As to that part of the case, then, we consider there is no question. There was no act on her part to be performed to enable him to recover that part of her estate; he had a right to receive it simply as husband, and to deal with it as his own, without her sanction or co-operation, subject alone to an active movement on her part in a court of chancery to declare the "wife's equity" in her favor. This not having been done, and no charge

that it was prevented by any promise of his, or anything done on his part, she cannot now complain, or ask any benefit on account of it.

But a very different case is made out in relation to the proceeds of her land. The proof is entirely satisfactory that she was induced to concur in the sale and conveyance of her land in Montgomery county upon a distinct agreement on his part that the amount received for it should be invested in other lands in West Tennessee for her benefit. The argument used by him to her was that much more, and as good if not better, land could be bought with the money, and in the end be greatly to the advantage of herself and children. There was not, perhaps, any clear and distinct proof by any one present at the time such an agreement was made between them, but the declarations and acts of both establish the fact with equal conclusiveness. He seemed to have no concealment on the subject, but during the whole period, from the date of the transaction down to his death, always declared the facts to any one who talked with him in relation to the land sold and purchased. He took her over to see the land before he purchased it; and obtained her consent and approbation to the purchase before it was made. Her children were settled on parts of the land without contract or consideration, and arrangements made for their permanent use of it, as the facts indicated, with declarations as to his purposes and intentions to that effect. And there is good reason to believe that if he had lived he would have carried out his intentions in legal form; or that if he had made a will, he would not have been unmindful of his engagements with his wife in the matter. But all that is speculation now, and the parties must stand upon their legal rights as they arise out of the facts established.

There can be no doubt, from the evidence, that before the complainant did consent to the sale of her land, her husband agreed and distinctly promised her to invest the proceeds for her benefit and that of her children after her in this tract of land, and that the proceeds were so invested. The probability is strong, from the facts, that this was the only condition on which she would or did agree to the sale, and that this assurance induced her to sign the conveyance of her land. What, then, is there in the way of the enforcement of this trust? The statute of frauds is not, because such a trust is good without writing, when clearly established by proof. It is in the nature a resulting trust, which may always be set up by parol. It is based upon a sufficient consideration. It is not "a contract for the sale of lands," which is required

by the statute of frauds to be in writing, but it is the assumption of a trust for the benefit of another, of a character which need not be in writing to make it obligatory upon the trustee, and will be enforced on account of the consideration. If it were voluntary, the law would not enforce it.

Our own cases fully establish this doctrine: *Chester v. Greer*, 5 Humph. 34; *Powell v. Powell*, 9 Id. 477; *Ex parte Yarborough*, 1 Swan, 202. In this last case the court say: "There can be no question in the case before us as to the wife's right, had there been any agreement or understanding between her and her husband that compensation should be made, or that he should be regarded as her debtor for the proceeds of her proportion of the land sold and conveyed by them." Without such an agreement, the receipt of the price of her land would not make him her debtor, or fasten any trust upon him. This is the clear distinction in all the cases, and it would be useless to accumulate authorities upon the subject at this day, when it is so well settled that the wife may deal with her husband in relation to her separate property, and hold him to the performance of his agreements with her upon that consideration. The one thousand one hundred dollars, then, received for her land, never became the money of the husband, but was the property of the wife as much as the land from which it was derived; and if he appropriated it by agreement to the purchase of land or other property, and took the title to himself, she could either make him her debtor for the amount, or assert a resulting trust in the property in which it was invested. In what does it differ from the ordinary case of a resulting trust, where the title to property is made to one person and the consideration paid at the time by another? The money was hers by virtue of his agreement, and the title was made to him. She is in equity the owner, and he held the legal title in trust for her. His heirs occupy the same position.

The result is, that the decree of the chancellor dismissing the bill must be reversed, and the right of complainant Polly declared to that proportion of the land which the one thousand one hundred dollars bears to four thousand dollars, the whole consideration. The title will be vested in her for life, and remainder to her children. This must be laid off to her as well as dower in the remainder of the tract. The remainder in the dower, as well as the balance of the whole tract, of course vests in the defendants as heirs at law of James Wallace.

The cause will be remanded for the execution of the decree to be now made.

RESULTING TRUSTS arising where one person pays the purchase price and the title is taken in the name of another: See *Smith v. Strahan*, 67 Am. Dec. 622; *Irwin v. Ivers*, 63 Id. 420, and cases in notes thereto.

RESULTING TRUSTS MAY BE ESTABLISHED BY PAROL: See same cases, and notes. The principal case is cited to this point in *Click v. Click*, 1 Heisk. 612, where the court say: "Complainant became the owner of the land by way of resulting trust; and although the deed on its face was absolute, the fact that John Click held the title merely as trustee is susceptible of proof by parol." In *Pillow v. Thomas*, 1 Baxt. 120, the court say that while the rules of law require the most satisfactory and convincing evidence to establish a resulting trust, it is now well settled that such a trust may be established upon the admissions of the trustee sought to be charged as such. The principal case is cited in *Jackson v. Rutledge*, 3 Lea, 629, where the court say: "A married woman may, with separate means, or by the proceeds of property in which she has an interest, purchase property, personal or real, from her husband or a third person, and have it settled to her separate use."

WHEATLEY v. HARRIS.

[4 SNEED, 468.]

OWNER OF DOG HAS SUCH PROPERTY IN HIM as will entitle him to maintain an action against any one for killing or injuring him.

TRESPASS for killing a dog. The opinion states the facts.

Bailey and Posten, for the plaintiff in error.

Vollentine, Treadwell, and Sullivan, for the defendant in error.

By Court, McKINNEY, J. This was an action of trespass, commenced before a justice of Shelby, for shooting a dog. On an appeal to the circuit court, the plaintiff recovered judgment for twenty-five dollars; to reverse which the case is brought here.

Upon the question whether the owner of a dog has such a property as will entitle him to maintain an action for killing or injuring the dog, there can be no doubt. The ancient authorities are clear upon this point. In Cro. Eliz. 125, it is laid down that the law takes notice of a greyhound, mastiff, dog, spaniel, and tumbler, and trover will lie for them. See also Cro. Jac. 44. A man hath a property in a mastiff; and where a mastiff falls on another dog, the owner of the latter dog cannot justify the killing the mastiff, unless there was no other way to save his dog, as that he could not take off the mastiff, etc.: 1 Saund. 84; 3 Salk. 139. The owner of a dog is bound to muzzle him if he be mischievous, but not otherwise; and if a man doth keep a dog that useth to bite cattle, etc., if, after notice given to him of it, or his knowing the dog is mischievous, the creature shall

do any hurt, the master shall answer for it: Cro. Car. 254, 487; Stra. 1264. By statute 10 Geo. III., c. 18, to steal a dog was made subject to penal punishment by fine or imprisonment, at the direction of the justices; and for the second offense, in addition, the dog-stealer was to be whipped.

The foregoing extracts from the ancient books—without noticing the more modern authorities—are sufficiently explicit, and show that the law upon the point of the master's property in a dog is well settled.

Judgment affirmed.

PROPERTY IN INFERIOR ANIMALS.—In regard to the ownership of animals, there is an important distinction between such as are *domitæ*, or domestic animals, and such as are *feræ naturæ*, or are of a wild disposition. The former class includes horses, cattle, sheep, our barn-yard poultry, and the like, and over them, of course, a man may have as absolute a dominion and property as over any other useful and valuable chattel. With regard to animals *feræ naturæ*, the case is different. In such animals a man can have only a special, limited, or qualified property, which continues only so long as they are under his dominion and control; such as where he has housed or confined them so that they cannot escape, or where he has educated or tamed them. If they escape from him or regain their natural liberty, his property in them instantly ceases, unless they have *animus revertendi*, which is to be known by their usual habit of returning whence they have escaped: 2 Kent's Com. 348; 2 Bla. Com. 390; Co. Lit. 8 a; *Case of Swans*, 7 Rep. 17 b; Broom's Legal Maxims, 395; Brooke's Abr., Propertie, 37; 7 Co. 17 b; 1 Ch. Pr. 87; 13 Vin. Abr. 207. This is well-established law, and will be found recognized or announced in all the cases hereinbelow cited. Law-writers and judicial tribunals have at various times made ownership of and property in inferior animals and animals *feræ naturæ* a subject of discussion, and we will below present some of their conclusions.

PROPERTY IN DOGS.—Dogs have at all times been held to be the subject of property or ownership, but of a very limited and qualified kind. Blackstone says that they, being of no intrinsic value, but being kept only through the whim or caprice of their owner, cannot be the subject of larceny; that their taking amounts only to a trespass, which, however, can be redressed by a civil action: 2 Bla. Com. 393. Again he says, regarding these animals, while discussing property which may be the subject of larceny: "As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny:" 4 Bla. Com. 235. The law as thus laid down by Blackstone, that a civil action may be maintained in a proper case for the loss or destruction of a dog, appears to be unquestioned in England and America, although, as is said in *Blair v. Forehand*, 100 Mass. 141, dogs have nearly always been held "to be entitled to less legal regard and protection than more harmless and useful domestic animals." That a dog is a species of property, for an injury to which an action at law may be sustained, see *Parker v. Miss*, 62 Am. Dec. 776; *Woolf v. Chalker*, 31 Conn. 121; *Spray v. Ammerman*, 66 Ill. 309; *Ullien v. Cromack*, 109 Mass. 273; *Mason v. Keel*

ing, 1 Ld. Raym. 606. An action of trespass or trover may be sustained for an injury to or the conversion of a dog: *Chambers v. Warkhouse*, 3 Salk. 140; *Wright v. Ramscott*, 1 Saund. 84. In an action for the killing of a dog, it is not necessary to show that he was of any pecuniary value, as dogs belong to that class of domiciled animals which the law recognizes as objects of property, and consequently will protect from invasion by civil action on the part of their owner: *Dodson v. Mock*, 32 Am. Dec. 677. The nature of the property and the ownership which one may have in a dog is more elaborately discussed in the cases upon the question whether larceny can be committed by stealing one of those animals. This question arises under statutes making it larceny to steal the "goods and chattels" or the "personal property" of another, and it will readily be seen that the question whether one may have a valuable property in a dog becomes very material in a prosecution of a person for larceny in stealing one. This question is discussed, and the cases upon this point are collected, in the note to *State v. Homes*, 57 Am. Dec. 277.

MISCELLANEOUS ANIMALS.—*Bees*.—Bees are *feræ naturæ*, and until hived and reclaimed, no property can be acquired in them: *Gillet v. Mason*, 7 Johns. 16. Wild bees in a tree belong to the owner of the soil where the tree stands: *Ferguson v. Miller*, 13 Am. Dec. 519. Finding a tree on the land of another containing a swarm of bees, and marking the tree with the finder's initials, is not a reclaiming of them sufficient to vest property therein in the finder: *Gillet v. Mason*, *supra*. But the ownership of the owner of the soil upon which a bee-tree is growing, in the bees, is not of such a nature as would make it larceny to steal them: *Willis v. Mease*, 3 Binn. 546. And the owner of the soil upon which a tree is growing in which reclaimed bees have taken up their abode is not the owner thereof. If the person who reclaimed such bees is able to identify them, his property therein continues: *Goff v. Kilts*, 15 Wend. 550.

Singing Birds.—A person may have a valuable property in a tame canary-bird. "To say that if one has a tame canary-bird, mocking-bird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, the first person who caught it would be its owner, is wholly at variance with our views of right and justice:" *Manning v. Mitcherson*, 69 Ga. 447; S. C., 47 Am. Rep. 764, and note. So a tame mocking-bird may be the subject of valuable property: *Haywood v. State*, 41 Ark. 479. This was a case in which the defendant was charged with the crime of larceny in having stolen a bird and the cage in which it was confined. The court say: "The market value of the bird was, perhaps, more than ten times that of the cage, which was the subject of petit larceny. To hold that larceny might be committed of the cage, but not of the bird, would be neither good law nor common sense."

Whales.—By capturing and killing a whale, and leaving it floating upon the ocean with marks of appropriation, it becomes the absolute property of its captors: *Taber v. Jenny*, 1 Sprague, 315; and they may maintain an action against one who appropriates it with or without knowledge of their title: *Bartlett v. Budd*, 1 Low. 223. A usage that a whale which has been harpooned by one ship's crew, and which runs with the harpoon and line attached, being pursued by such crew, shall belong to them as against the crew of another vessel which capture it, is admissible, and if shown, will be given effect: *Swift v. Gifford*, 2 Id. 110. So in Massachusetts bay fin-back whales are killed with bomb-lances, and sink to the bottom. They float to the surface in two or three days; and a usage that they shall belong to the person who killed them, no matter by whom found, is enforced: *Ghen v. Rich*, 8 Fed. Rep. 159.

Oysters.—Oysters, though generally spoken of as animals *feræ naturæ*, and perhaps are so, strictly speaking, differ from the majority of such animals in several particulars. They do not need to be tamed; they cannot escape, possessing no power of locomotion; nor can they have *animus revertendi*. It follows, therefore, that a man can have a property in them only when they are in his possession, but when in such possession, his ownership of them is as absolute as of inanimate things or domestic animals: *Brinckerhoff v. Starkins*, 11 Barb. 248; *State v. Taylor*, 27 N. J. L. 117. Oysters planted by an individual in a bed clearly designated and marked out in navigable waters, which are free for all the inhabitants of the state, are the absolute individual property of the person planting them. But it is indispensable to the existence of the right of property in oysters thus planted that the bed shall not interfere with the exercise of the common right of fishing; for if the oysters were mingled with and undistinguishable from others of natural growth in the public waters, the interest of the person planting them would be subservient to the public use: *Lowndes v. Dickerson*, 34 Barb. 586; *Decker v. Fisher*, 4 Id. 592; *Fleet v. Hegeman*, 14 Wend. 42; *State v. Taylor*, 27 N. J. L. 117. A person who plants oysters in navigable waters opposite to the land of another person does not thereby acquire such a possession of them as will enable him to maintain trespass against the owner of the adjacent land for taking them away: *Brinckerhoff v. Starkins*, 11 Barb. 248.

Doves, Pigeons, Wild Geese, Pheasants, etc.—It appears that for doves to be a subject of property they must be confined in a dove-house: *Commonwealth v. Chance*, 9 Pick. 15; S. C., 19 Am. Dec. 348. But the property in carrier-pigeons continues, although they be absent from the home of their owner, flying across the country in process of training: See case reported in the Law Times, May 28, 1881; S. C., 23 Alb. L. J. 482; see also *Rex v. Brooks*, 4 Car. & P. 131; *Regina v. Cheasfor*, 8 Eng. L. & Eq. 598. Wild geese which have become tame and gentle, and have lost their power or disposition to fly away, become the absolute property of the person who tamed them, and his property in them is not lost by their straying away to a neighbor's house: *Amory v. Flynn*, 10 Johns. 102; S. C., 6 Am. Dec. 316. Pheasants which have been reared by a hen, and were never wild, and young pheasants hatched by a hen, and under her care, are such objects of property that stealing them amounts to larceny: *Regina v. Cory*, 10 Cox C. C. 23; *Regina v. Garnham*, 8 Id. 451; S. C., 2 F. & F. 347. In speaking of the wild animals in which a man may have a valuable property, Bishop says: "Of animals of which, when reclaimed, larceny may be committed within the foregoing rules, are pigeons and doves, hares, conies, deer, swans, wild boars, cranes, pheasants, and partridges, to which may be added fish valuable for food, including, undoubtedly, oysters." And he cites, among cases already cited, 1 Hawk. P. C., Curw. ed., 149, sec. 41, 42; 4 Bla. Com. 235; 1 Hale P. C. 511, 512; 3 Inst. 110; *Regina v. Shickle*, L. R. 1 C. C. 158; *Regina v. Head*, 1 F. & F. 350; *Regina v. Roe*, 11 Cox C. C. 554; 2 East P. C. 610; 2 Bishop's Crim. L., secs. 771, 772; see also *Commonwealth v. Beaman*, 8 Gray, 497.

Buffaloes.—A tamed and domesticated buffalo is not included in the word "cattle," as used in an act to prevent cruelty to the same: *State v. Crenshaw*, 22 Mo. 457. But a buffalo which has been captured when a calf, and reared on a farm with domestic cattle, and becomes so tame as to take food from the hands of its master like other cattle, and to be easily driven home when it strays away, is no longer of a wild nature, but is the subject of property, and for any trespass committed by it the owner is liable, and for any injury done to it by others he can recover damages: *Ulery v. Jones*, 81 Ill. 403.

Otter.—An otter is an animal *feræ naturæ*, but being valuable for its fur, if it be reclaimed, confined, or dead, it is the property of the person so holding it, and to steal it from him is larceny: *State v. House*, 65 N. C. 315.

Coons.—In *Warren v. State*, 1 G. Greene, 106, the court held that a man has not such a property in a coon as makes it larceny to steal it from him.

Possession.—We have seen that in order to acquire a valuable property in animals *feræ naturæ*, they must have been captured or reduced to possession: Upon this question, see note to *Orser v. Storms*, 18 Am. Dec. 553.

BRYAN v. HUNT.

[4 SHEP., 543.]

WHERE CONTRACT HAS BEEN REDUCED TO WRITING, AND IS INTELLIGIBLE, evidence of what passed between the parties before it was written out, or while it was in preparation, to change or vary its terms, is not admissible. This rule does not exclude agreements or stipulations made after its execution, however.

IT IS COMPETENT, AT ANY TIME BEFORE BREACH OF EXECUTORY WRITTEN CONTRACT TO CHANGE OR VARY ITS TERMS by a parol agreement, or to annul or dissolve it altogether, if done upon a sufficient consideration.

IT IS COMPETENT, IN ACTION AGAINST VENDOR FOR FAILURE TO DELIVER FLOUR BY CERTAIN AGREED DATE, for him to show that the vendee had said, after the written agreement had been made, that if the tide did not rise in the river over which the flour was to be transported, it need not be delivered by that time. The effect of this evidence is a question of fact for the jury.

ASSUMPSIT, in which the verdict and judgment went for the defendant. The opinion states the facts.

Maynard, Haynes, and Deadrick, for the plaintiff.

Nelson and Heiskell, for the defendant.

By Court, McKINNEY, J. On the twenty-second of November, 1854, an agreement in writing, not under seal, was entered into between the parties, whereby Hunt—whose residence was at Spurgeon's Mill, on the Holston river, in Sullivan county—agreed to deliver to Bryan at Chattanooga, on the Tennessee river—the place of residence of the latter—"five to six hundred barrels of flour," at a stipulated price; "one hundred or more barrels to be delivered on the first tide, and the balance to be delivered as soon as convenient between now and the first of June."

Part of the flour was delivered within the time stipulated; and for the failure to deliver the remainder before "the first of June," the present action was brought.

The defense is placed upon the ground that the delivery of the remainder of the flour was prevented by reason of the want of a sufficient tide in the Holston river.

The proof shows that immediately after the contract was completed and the written instrument signed by the parties, Hunt asked Bryan, "if there was no tide, would he expect him to deliver the flour." To which Bryan replied, "he did not expect him to deliver it if there was no tide."

The question for our consideration is in regard to the admissibility and effect of this evidence, which, though objected to by the plaintiff, was allowed to go to the jury, who rendered a verdict for the defendant.

It is a well-settled rule of the common law, independently of the statute of frauds, that where a contract has been reduced to writing, and is complete in its terms and free from ambiguity, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract. The written instrument must be considered as containing the true agreement between the parties, and as furnishing the best evidence of their final intentions and acts. And this rule, excluding prior or contemporaneous stipulations or conversations, applies with no less force to simple contracts than to contracts by specialty: 4 Phill. Ev., ed. of 1849, note 295.

But though all verbal negotiations and stipulations between the parties to a written agreement anterior to or contemporaneous with the execution of the instrument are in general to be regarded as merged in it, it is well settled that the rule has no application to stipulations or agreements made between the parties subsequent to the execution of the written instrument.

Agreements not by specialty, whether written or unwritten, are of the same grade and dignity in law, and are denominated simple contracts. Hence it follows that to admit evidence of a subsequent parol agreement, for the purpose of showing an abandonment, discharge, or alteration of the terms of a previous written agreement not under seal, would not be to affect or dissolve the agreement by matter of an inferior nature. And therefore it is generally admitted that it is competent to the parties to an executory written contract not under seal, at any time before breach thereof, by a subsequent verbal agreement founded on a sufficient consideration, either to waive altogether or dis-

solve or annul the previous written agreement, or in any manner to add to, subtract from, or vary or qualify the stipulations of such agreement, and thus to make a new or different contract: Ch. Cont., ed. of 1848, 107; 2 Phill. Ev. 363, 364; 4 Phill. Ev. 301, note.

Upon the principle announced, it is clear that the evidence of the subsequent conversation between the parties was admissible upon the question of fact—whether the parties by a subsequent parol agreement had altered or modified the original written contract, either in its terms or legal effect. Of course it is a question of fact whether or not the subsequent conversation furnishes sufficient evidence of an agreement to alter or modify the previous written contract.

Upon other questions discussed in the argument we think it unnecessary to express an opinion. The case must rest upon the point and be governed by the principle before stated. And as the charge of his honor the circuit judge presents the case in a different aspect, and applies a different principle for its decision, the judgment must be reversed, and the case remanded for a new trial.

COLLOQUIUM OR ORAL NEGOTIATIONS LEADING TO CONTRACT which the parties consummate by reducing to writing cannot be introduced in evidence to explain or vary the writing. The law excludes any other evidence of the language used by the parties in making the contract than that which is furnished by the instrument itself: *Blossom v. Griffin*, 67 Am. Dec. 75, and cases in note; see also *Emery v. Webster*, 66 Id. 274; *Pillsbury v. Locke*, Id. 711; *Rockmore v. Davenport*, 65 Id. 132.

WRITTEN CONTRACT MAY BE ALTERED by subsequent parol agreement, where the alteration is made on a good consideration, and before any breach of the contract. And in an action for a breach of the written contract, such alteration may be proved, although the oral agreement be within the operation of the statute of frauds: *Cummings v. Arnold*, 37 Am. Dec. 155. An oral agreement made after written agreement, and before the breach thereof, is admissible to show a new contract waiving, varying, or annulling, the written contract: *Spann v. Baltzell*, 46 Id. 346; see also cases in notes to *Herson v. Henderson*, 53 Id. 187; *Adams v. Wilson*, 45 Id. 242.

THE PRINCIPAL CASE IS CITED to the point that parol evidence of previous or contemporaneous stipulations or terms not incorporated in a written contract is inadmissible to vary or contradict the terms of the written instrument, in *East Tenn. etc. R. R. Co. v. Gammon*, 5 Sneed, 570; *Kearly v. Duncan*, 1 Head, 400; *Fields v. Stumston*, 1 Coldw. 42; and in *Lytle v. Bass*, 7 Id. 303, to the point that parol evidence is admissible for the purpose of establishing a separate collateral and substantive contract between the parties, not embraced in the writing sued on.

SHELTON v. JOHNSON.

[4 SWEEP, 672.]

LIS PENDENS.—The doctrine of *lis pendens* is that any interest acquired in the subject-matter of a suit while it is pending will be regarded as a nullity as to the plaintiff's title, which may be established by a judgment or decree in the suit.

DOCTRINE OF LIS PENDENS HAS NO EXTRATERRITORIAL OPERATION; and consequently the pendency of a suit involving the title to certain property in one estate is no notice to a purchaser of said property living in another state to which it has been removed.

PRESUMPTION OF LAW STATED IN BOOKS, THAT "LIS PENDENS IS NOTICE TO ALL THE WORLD," must be limited in its construction to all persons within the jurisdiction or state where the suit is pending.

PROVISION IN FEDERAL CONSTITUTION THAT "FULL FAITH AND CREDIT SHALL BE GIVEN in each state to the public acts, records, and judicial proceedings of every other state" does not extend the application of the doctrine of *lis pendens* beyond the limits of the state where the suit is pending; it does not mean that all the effects and consequences of a litigation in one state shall follow it to another.

BILL in chancery to recover certain slaves in possession of defendants, and purchased by them in this state. They have been in defendants' possession for more than twenty years, but complainants claim that their right is not barred, as there has been a suit pending in the Virginia courts, involving the title to these slaves, from a time anterior to defendants' purchase. Defendants' demurrer to the bill was sustained.

E. H. Ewing, and R. H. and John A. McEwen, for the complainants.

W. F. Cooper, for the defendants.

By Court, CARUTHERS, J. This case raises a question upon the application of the doctrine of *lis pendens* in a shape in which it has not before perhaps been presented to our courts. It comes up upon demurrer to the bill. The facts set forth in the bill are these: Joshua Shelton of Virginia, by his will, left the slaves from which those in controversy descended to his wife, Polly Shelton, for life, and then to the complainants. In 1819 they filed their bill in the chancery court at Lynchburg, Virginia, against the widow and Bell and Woodruff, upon the ground that they had conspired to defeat the remainder, and to have the same made secure by bond for the forthcoming of the slaves, at the termination of the life estate. The security was given under an order of the court by Bell, but his sureties became insolvent, and he removed with the slaves to Tennessee in 1820.

The defendants hold said slaves as purchasers from Bell or his vendees, either mediate or immediate. By a decree of the twenty-fourth of June, 1853 the rights of the parties were adjudicated and settled in that suit; and the case still continuing on the docket, an order was made in 1856 that Ralph Shelton and another should pursue the slaves, and if necessary, bring suit for them. In pursuance of that authority, this bill was filed on the twenty-eighth of July, 1856. Polly Shelton died in 1850.

It is further charged in the bill that said Bell claimed the negroes as his own in Tennessee from 1820 to about 1838, when he conveyed those now sued for to Ferrell to defraud his creditors. He sold Matilda and her children to Johnson, who died, and they were bought at the public sale of the property by defendant Alford, who now holds and claims them. In 1844 said Jonathan Bell sold Wesley, another one of the slaves, to David A. Bell, his son, to defraud his creditors, and he, in the same year, sold him to Robards, and he to the defendant Bailey Johnson.

For these slaves this bill is filed against Alford, Johnson, and David A. Bell. The defendants demur, upon the ground that by the showing of the bill they are protected by the statute of limitations. In answer to this, the complainants contend that the defense cannot be allowed, because of the pendency of their suit in Virginia for these slaves from the year 1819 until the present time, and that by the doctrine of *lis pendens*, no valid right could be acquired to these slaves to which they claimed title in their suit under any of the defendants in the same. The chancellor sustained the demurrer, upon the ground, as he states in his decree, "that the pendency of the litigation in the state of Virginia, mentioned in the bill, was no notice to the defendants of complainants' rights nor of such litigation, and consequently that the complainants' claim to the negroes in controversy has been long since barred by the statute of limitations."

Without stopping to inquire for the present whether there are no other grounds upon which the decree could be maintained besides that on which the chancellor places it, we will briefly examine that. The argument here is confined to that point, and if that is with the defendants, it is certainly decisive of the case, without reference to other grounds that might probably, in reference to the statute of limitations, be assumed.

Then, if the pendency of a suit in the courts of this state for

personal property would prevent the operation of the statute in favor of one claiming adversely upon a title and possession commencing during the pendency of the suit, which question need not now be considered, would a suit in another state have the same effect? or, in other words, does the doctrine of *lis pendens* have extraterritorial application?

The rule on this subject is, that any interest acquired in the subject-matter of a suit while it is pending will be regarded as a nullity as to the plaintiff's title, which may be established by a judgment or decree in the suit.

The rule is generally placed on the ground of notice, either actual or constructive. The law presumes that "judicial proceedings during their continuance," says Adams in his work on equity jurisprudence, at page 157, "are publicly known throughout the realm." In note 1, on the same page, it is laid down that "the whole world—that is, all men in that jurisdiction or state—are warned that they meddle at their peril with the property sued for, and specifically pointed out, in such judicial proceedings." Such is there said to be the principle of *lis pendens*. This rule is founded more upon the necessity for it, to give effect to the proceedings of courts, than upon any presumption of notice. Without such a principle, all suits for specific property might be rendered abortive by successive alienations of the property in suit; so that at the end of one suit another would have to be commenced; after that, another, by which it would be rendered almost impracticable for a man ever to make his rights available by a resort to the courts of justice. Whether this rule is founded on the idea of notice, or is a positive, arbitrary rule, suggested and sanctioned by policy or necessity, there is certainly no principle more essential to the administration of justice than the doctrine of *lis pendens*, though attended with occasional hardships. But if extended beyond its proper limits, it would become unjust and pernicious.

This whole doctrine is very fully examined in *French v. Loyal Company*, 5 Leigh, 646-681; *Newman v. Chapman*, 2 Rand. 102 [14 Am. Dec. 766]; and 2 Lead. Cas. Eq., pt. 9, p. 158.

But the question here is not so much what the doctrine is as the extent of its application. A very able and ingenious argument is made in this case to prove that the same effect must be given to the pendency of a suit in this respect in all the states of this Union that it has in the local forum.

We are referred to article 4, section 1, of the constitution of the United States to establish this position: "Full faith and

credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." It is argued that the suit in Virginia was a "judicial proceeding," and that as its effect, under the doctrine of *lis pendens*, would there be to avoid all contemporary sales of the property, the same effect must be given to it in this state.

By the next clause, congress is required to prescribe by general laws the manner in which such "records and judicial proceedings shall be proved, and the effect thereof." This provision has never been held to authorize the issuance of final process to execute decrees and judgments of another state. It only recognizes the rights of parties as settled according to such record, and becomes the foundation of an action in any other state in the place of the original cause, and closes all investigation of the merits, where it appears the court from which the record comes had jurisdiction of the parties, with some few excepted cases. This is what is meant by giving "full faith and credit." It does not mean that all the effects and consequences of a litigation in one state shall follow it to another.

The principle of *lis pendens* is, as we have seen, to prevent any obstruction being thrown in the way of the execution of a judgment after it has been pronounced at the end of a litigation in the courts, by intervening rights acquired to the thing sued for. Rights so acquired will not be permitted to frustrate the objects of a suit in court, but it will be passed over as if they had never existed. But the judgments of sister states cannot be executed here by process, and therefore the reason of the rule does not apply. There is no recognized comity between the states that would require such an effect to be given to judicial proceedings, of which we are aware.

It is a very strong and forced presumption to make in most cases, within the same state, that all its citizens have knowledge or notice of all the suits that may be pending in all the courts of record in the state. But though we know it is the presumption of an impossibility, yet the urgent policy of the rule has forced its adoption. But it would be an absurd and unreasonable extension of it to make it apply to every court in the Union. This would shock the common sense of mankind, and bring odium upon the whole doctrine. The phrase thrown out in the books, in laying down the rule that "*lis pendens* is notice to all the world," must be limited in its construction to all persons within the jurisdiction or state where the suit was pending. It

cannot be carried further upon correct principles or reason, and there is no authority on the question to control us.

The result is, that the decree of the chancellor is correct, and must be affirmed.

FOR EXTENSIVE DISCUSSION OF DOCTRINE OF *LIS PENDENS*, see note to *Newman v. Chapman*, 14 Am. Dec. 766; and for a collection of cases reported in this series, see note to *Fletcher v. Ferral*, 35 Id. 143; *Trimble v. Boothby*, 45 Id. 526; *Winston v. Westfeldt*, 58 Id. 278; *Clark's Heirs v. Farrow*, 52 Id. 552.

PURCHASER OF SUBJECT-MATTER OF SUIT *PENDENTE LITE* acquires no interest as against the title, whether legal or equitable, of the plaintiff in that suit: *Briscoe v. Bronaugh*, 46 Am. Dec. 108.

EXTRATERRITORIAL OPERATION.—Upon this question the case of *Fletcher v. Ferral*, 35 Am. Dec. 143, is in direct conflict with the principal case. In this case the court hold that the purchaser of property in one state while a suit is pending in another regarding its title is a purchaser *pendente lite*, and subject to the operation of the doctrine of *lis pendens*. And the court base their decision upon the construction of article 4, section 1, of the federal constitution, the application of which was denied in the principal case. The reasoning of the latter case appears to be the most safe and convincing. In *Hart v. Hawkins*, 6 Id. 666, the court remark that extraterritorial proceedings do not of themselves operate as constructive notice, and in *Powell v. Williams*, 48 Id. 105, it is said that *lis pendens* is notice to all persons, at least within the jurisdiction of the state.

PURCHASER WILL BE AFFECTED with constructive notice whenever his purchase is made during the prosecution of a suit brought to enforce an adverse claim or title which is set forth with sufficient certainty and distinctness to advise him of its bearing on the property in litigation: *Roberts v. Francis*, 2 Heisk. 133; *Boshear v. Lay*, 6 Id. 168. The doctrine of *lis pendens* is not a ground for liberal but strict construction, with a view to the protection of innocent third persons not having actual notice. If the rule be extended beyond its proper limits, it would become unjust and pernicious: *Cockrill v. Maney*, 2 Tenn. Ch. 59, all citing the principal case.

AMES v. NORMAN.

[4 SHEED, 683.]

HUSBAND AND WIFE—HUSBAND'S CONTROL OVER JOINT PROPERTY.—During the coverture, the husband has the same rights and power over real estate conveyed to himself and wife as he has in regard to the wife's individual estate owned by her at the time of her marriage. Without his wife's consent he may transfer such estate, may charge it at law with his debts, and it may be seized and sold by his creditors. But the purchaser acquires no greater estate than the husband, and consequently he holds it subject to the contingent right of the wife, who, in case she survives her husband, becomes absolute owner of the whole estate. So if the husband survives, the purchaser acquires the fee in the whole estate.

WHERE HUSBAND AND WIFE ARE JOINTLY SEISED OF REAL ESTATE, PURCHASER THEREOF AT EXECUTION SALE for the debt of the husband cannot be affected in his title thereto by the subsequent divorce *a vinculo* of such husband and wife. He holds such property absolutely, subject to the contingency that the wife should outlive her husband, in which case her title attaches in fee.

BILL for divorce; also that a certain tract of land be decreed to be the sole and absolute property of complainant. The opinion states the facts.

Martin, for the complainant.

Hutton, for the defendant.

By Court, MCKINNEY, J. This was a bill for a divorce, and likewise to have the title to a tract of land divested out of the defendant Norman and vested in the complainant. The chancellor decreed for the complainant, both as against the husband and the defendant Norman. The former acquiesced in the decree of divorce, and the case is brought here by Norman, in whose behalf it is insisted that the decree divesting him of title to the tract of land in the pleadings mentioned is erroneous.

The facts upon which the question arises are these: On the thirty-first of January, 1835, some time after the marriage of the complainant and the defendant William Ames, one Lawrence Sybert conveyed to them jointly a tract of land situate in Wilson county, containing fifty-four acres, for the consideration, as recited in the deed, of three hundred and thirty-three dollars. This deed of conveyance was properly proved and admitted to registration on the day of its execution. The bill alleges and the deed recites, and there is proof tending to establish the fact, that the purchase money of said tract of land was part of the distributive portion of the complainant of the estate of her deceased father. On the fourteenth of May, 1853, said tract of land was sold at execution sale in satisfaction of a judgment against the defendant William Ames; and the defendant Norman, as a creditor of Ames, afterwards redeemed the land from the purchaser at said sale, previously to the filing of the present bill, and by virtue of the title thus acquired, he resists the right of the complainant to recover the same. And the question for our determination is, Can he successfully do so? Upon this precise question we have found no direct adjudication, but upon principle, we think the question is free from doubt.

The first question to be considered is, Had the husband such an interest in the land of which he and his wife were jointly

seised as was subject to seizure and sale on execution by his creditors? And if so, is the interest or title of the purchaser at execution sale subject to be divested, or in any way affected, by a subsequent divorce *a vinculo matrimonii* granted to the wife?

1. By the common law, the husband and wife are as one person in law; the legal existence of the wife is incorporated into that of the husband; and though in modern times exceptions to this doctrine have been introduced, the general principle still exists. As one of the necessary results of this unity of persons in husband and wife, it has always been held that where an estate is conveyed or devised to them jointly they do not take in joint tenancy; constituting one legal person, they cannot be vested with separate or separable interests. They are said, therefore, to take by entireties; that is, each of them is seised of the whole estate, and neither of a part. And this tenancy may exist whether the estate is in fee, for life, for years, or other chattel interest, and whether the property be in possession, reversion, or remainder: Co. Lit. 187 b; 1 Bright on H. & W. 25. As a consequence peculiar to this tenancy, it is laid down in the books that during their joint lives neither can alien the estate thus held, without the consent and concurrence of the other, and the survivor takes the whole estate; neither can sever the joint interest; the whole estate belongs to the wife as well as to the husband, and the husband cannot, by his own conveyance, the wife not joining therein, divest her estate: 1 Greenl. Cru. 365; 2 Bla. Com. 182; 2 Kent's Com. 132; 4 Id. 363.

From the peculiarity of this tenancy, the unity and indivisibility of the seisin, there is some confusion in the cases respecting the power of the husband alone to make any conveyance or disposition of the land thus held during their joint lives, and also as to the right of creditors of the husband to subject the same to the satisfaction of the husband's debts. But upon examination of the authorities, it appears to be settled that during their joint lives the husband may dispose of the estate. He may lease or mortgage it, or it may be seized and sold upon execution for his debts. The doctrine, properly understood, is that the husband, without the wife's joining him in the conveyance, cannot alien the estate so as to affect the interest of the wife in case she survives him, as in that event she will be entitled to the whole: 4 Kent's Com. 363. Nor will the wife's interest be affected by the attainder of the husband; she will, on surviving,

take the whole estate. By the attainder of the husband of felony, the crown will not acquire the fee, but only the pernancy of the profits during the coverture of the wife: Co. Lit. 851.

It seems, therefore, that notwithstanding the peculiar nature of this tenancy, the husband, during the coverture, acquires substantially the same rights, and power of disposition of the estate thus held, that he does in regard to the wife's individual estate owned by her at the time of her marriage. Consequently it follows that the husband, without the consent or concurrence of the wife, can charge such estate at law with his debts; that he may transfer it; that it may be seized and sold by his creditors. But the assignee of the husband, or purchaser at execution sale, can acquire no other or greater interest than was vested in the husband; and consequently, he holds in subordination to the contingent right of the wife, who, in case she survives the husband, becomes absolute owner of the whole estate. So, on the other hand, if the husband survives, the purchaser from him or at execution sale becomes owner in fee of the entire estate: *Rogers v. Grider*, 1 Dana, 242; *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Id. 175.

2. It being established that the interest of the husband in such an estate may be sold on execution for the satisfaction of his debts, we proceed to inquire whether the title of the purchaser is liable to be affected by a divorce *a vinculo* afterwards granted to the wife.

The decree in this case would seem to take it for granted that upon a dissolution of the marriage by a divorce at the suit of the wife, the same legal consequences follow, in all respects, as if the marriage had been dissolved by the death of the husband. This is a very erroneous assumption, so far at least as relates to the question under consideration.

In England, divorces *a vinculo matrimonii* are granted only for such causes as by the ecclesiastical law are sufficient to avoid the marriage in the spiritual court; and in such cases the marriage is declared void, as having been absolutely unlawful *ab initio*: 1 Bla. Com. 435, 440. In a divorce of this kind, grounded upon the nullity of the marriage contract, it is said in the books that the husband acquires no right over the wife's property; though in some of the authorities a distinction appears to be taken between the wife's personal and real property. If the husband, before the divorce, had disposed of the goods of the wife without collusion, it seems she was without remedy; but if the sale or gift were collusive, she might recover the

goods so far as they could be traced, and for the rest, as money etc., she might sue in the spiritual court: 2 Bright on H. & W. 364, 365. This distinction perhaps arose out of the doctrine maintained by the courts of common law, that marriages contrary to the ecclesiastical law, though voidable, were not *ipso facto* void until sentence of nullity were pronounced.

In regard to the wife's real property, it is settled that if the husband aliened the land of the wife, of which he was seised in right of the wife, and a divorce was afterwards obtained, the wife's right remained unaffected by the husband's conveyance; such conveyance did not work a discontinuance of her estate, and by construction of the statute 32 Hen. VIII. it was held that she might immediately enter.

And, more directly to the point under consideration, it is laid down that if the husband and wife purchase an estate jointly and are disseised, and the husband releases, and afterwards they are divorced, the wife shall have the moiety, though before the divorce there were no moieties, for the divorce converts it into moieties: 1 Bright on H. & W. 25, 162, 165; 2 Id. 364.

This must necessarily be so; for although in such case the relation of husband and wife existed *de facto* at the time the conveyance was made to them jointly, yet, in contemplation of law, that unity of persons out of which this anomalous tenancy springs, and on which alone it depends as a mere incident, never did exist; and as some effect must be given to the conveyance, the divorce is regarded as having severed the entirety, and turned it into moieties.

It would seem reasonable that this principle should be held equally applicable to cases where a marriage lawfully contracted is dissolved by a divorce *a vinculo* for some supervenient cause, as frequently happens under our law, though its application is perhaps not so easy in such cases as where the marriage contract was void *ab initio*.

If the rights of husband and wife in relation to an estate held by entireties are not altered by the decree declaring the divorce, what becomes of the joint estate? what are their respective rights in the future in regard to it? They are no longer one legal person; the law itself has made them "twain." They are no longer capable of holding by entireties; the relation upon which that tenancy depends has been destroyed; the one legal person has been resolved, by judgment of law, into two distinct, individual persons, having in the future no relations to each other; and with this change of their relations must necessarily follow

a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold by a joint seisin, they must hold by moieties. The law, in destroying the unity of persons between them, has, by necessary consequence, destroyed the unity of seisin in respect to their joint estate; for, independent of the matrimonial union, this tenancy cannot exist. And hence it has been held that a conveyance to a man and woman while single, and who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage: 1 Inst. 187 b.

But if this reasoning be correct, as between the husband and wife, the question remains, What effect has the divorce upon the rights of a third person who has acquired the interest of the husband by purchase at execution sale prior to the divorce?

We are of opinion that the subsequent divorce has no effect whatever upon the rights of such purchaser. It is true, the purchaser at execution sale succeeds merely to the rights of the husband in the estate; that is to say, he acquires no other or different right, either as regards the quantity or quality of estate, than was possessed by the husband; and he takes it subject to all the rights, legal or equitable, existing in favor of third persons at the time of the sale. But still the purchaser is not, to every intent and purpose, placed in the shoes of the husband. On the contrary, he holds the estate independent of the husband and of his future creditors, and entirely free from all future accidents or contingencies that might, as against the husband, if the title had remained in him, have directly or indirectly affected the estate.

The purchase in the present case was not made in view of the contingency of the wife's divorce at some future period, and cannot be affected by it.

The defendant by his purchase became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and to enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that if the complainant survives her former husband, his estate will then terminate; but if the husband survives, he will become absolute owner of the whole estate.

The only remaining inquiry is, whether the act of 1849-50, c. 36, has any application to this case. And we think it has not. This act only protects from the creditors of the husband the interest in the wife's lands vested in him *jure uxoris*; in other words, it is applicable only to cases where the fee is in the wife alone, and not to cases where they are jointly seised in

There is much force in the suggestion that to extend the act by construction to a case like the present would place it in the power of the husband, by resorting to mere forms of conveying, to put his entire real estate beyond the reach of his creditors.

No equity can arise in favor of the complainant in this case in consequence of the land having been purchased with money derived from her father's estate. The money had been previously reduced to possession by the husband, and in law it thereby became his money.

The only claim that can be admitted, on the part of the complainant in the present case, rests alone upon the doubtful contingency of her outliving her former husband. In that event, she will instantly become absolute owner of the entire tract of land; in the contrary event, she will have no interest in the land whatever.

The decree will be reversed, and the bill be dismissed as to the defendant Norman; but without prejudice to any future right which by possibility may arise in complainant's favor.

ALL QUESTIONS ARISING IN PRINCIPAL CASE ARE DISCUSSED AT LENGTH in *Den v. Hardenbergh*, 18 Am. Dec. 371, and note. The following cases maintain the same doctrine: *Harding v. Springer*, 31 Id. 61; *Jackson v. McConnell*, 32 Id. 439; *Fairchild v. Chastelleux*, 44 Id. 117; *Needham v. Branson*, Id. 45; *Gibson v. Zimmerman*, 51 Id. 168; *Wyckoff v. Gardner*, 45 Id. 388; *Brownson v. Hull*, 42 Id. 517; *Miller v. Miller*, 33 Id. 157; *Johnson v. Hart*, 40 Id. 565; *Moss v. McCall*, 46 Id. 272; *Martin v. Jackson*, 67 Id. 489.

THE PRINCIPAL CASE IS CITED *arguendo* in *Allen v. McCullough*, 2 Heisk. 175, where the court decide that a husband by divorce is not relieved from liability for the wife's debts, as in case of the dissolution of the relation by death, but that he continues liable as if the marriage had not terminated. It is also cited in *Aiken v. Suttle*, 4 Lea, 103, to the point that the purchaser of the husband's interests in the wife's lands, prior to the passage of acts abridging the husband's power of disposition, took it as it then stood, and without reference to the contingency of a subsequent divorce at the wife's instance, which therefore had no effect upon the rights of such purchaser.

COLE v. COLE.

[5 SWEED, 57.]

MARRIAGE IS CIVIL CONTRACT, AND MAY BE AVOIDED, LIKE OTHER CONTRACTS, for want of sufficient mental capacity in the parties. If at the time of attempting to contract the mind is unsound, it is incapable of that consent which is necessary to the validity of the contract.

MENTAL UNSOUNDNESS TO AVOID MARRIAGE CONTRACT MUST BE CLEARLY SHOWN, and must be sufficient in degree, as it is not every unsoundness that will avoid the contract.

It is difficult to determine degree of mental incapacity disabling one from consenting to the contract of marriage. The general test is the fitness of the person to be trusted with the management of himself and his own concerns. Such a person has a disposing, contracting mind, although it may be in a degree impaired.

LUNATIC ON REGAINING HIS REASON MAY AFFIRM MARRIAGE celebrated while he was insane, and no new solemnization is necessary.

BILL for the annulment of marriage. The opinion states the facts.

John M. Bright, for the complainant.

W. F. and Ed. Cooper, for the defendant.

By Court, CARUTHERS, J. This bill was filed on the eleventh of October, 1857, in the chancery court of Lincoln county, to rescind a contract of marriage consummated between the parties on the sixteenth of March, 1847, upon the ground of the insanity of the complainant at the time. The chancellor dismissed the bill upon the facts, and the case is hereby appealed.

At the time of the marriage the complainant was about forty-six and the defendant about fifty-two years of age. He was a widower with a family of children, and she a widow without children. She had been twice married, first to Thornton, and then to Reddick. Thornton died about the year 1836, a short time after the death of his two children by the complainant, leaving her all his property, consisting of a plantation, twelve or fifteen slaves, etc. She married Reddick in 1840, and after living together a week or two, they disagreed, perhaps about her property, and she abandoned him. Each filed their bills for a divorce in the chancery court at Huntsville, and in June, 1845, a divorce was granted upon his bill on the ground of abandonment, and hers was dismissed. In neither of their bills was any issue made upon her mental condition. She removed to Tennessee and settled in Lincoln county, in 1844 or 1845, where she purchased a farm, on which she placed her slaves and other property, and continued to manage the same until her marriage with defendant.

This bill is based upon the allegation that she was of unsound mind at the time of the marriage, as well as before and afterwards, and a volume of proof was taken, both in Alabama and Tennessee, on both sides, upon this question. The contradiction and conflict usual in investigations of this kind, where the mind is the subject and opinions are evidence, is to be found in the proof.

Marriage, by our law, is a civil contract, and may be avoided.

like any other contract, for want of sufficient mental capacity in the parties. If the mind is unsound at the time, it is incapable of consent, and that is an essential element in all contracts.

In the dark ages, when there was thought to be something sacred and mysterious in the matrimonial relation, and its civil was almost obliterated by its spiritual character, the marriage of persons of unsound mind was held valid. Blackstone, in the second volume of his Commentaries, 438, 439, says this was "a strange determination, since consent is absolutely requisite to matrimony, and neither idiots or lunatics are capable of consenting to anything." The test question in all such cases is, whether the party is capable of making any binding contract. The identity of the doctrine that unsoundness of mind vitiates this as well as all other contracts is well established. But every consideration of policy and humanity admonishes us that a contract so essentially connected with the peace and happiness of individuals and families, and the well-being of society, should not be annulled on this or any other ground not clearly made out. The consequences in many cases would be most deplorable. The rights of property would be unsettled, and the peace of families destroyed, to say nothing about the effects upon the innocent offspring. The annulment of other contracts would only affect property, but this would do that and more, it would tell upon the happiness, character, and peace of the parties. The appalling character of these consequences is well calculated to impress the courts with the solemn duty of requiring a clear case for the application of the general principle to this delicate and important contract. It is, however, only a civil contract, and must stand or fall by the usual tests applicable to contracts.

It is not every unsoundness that will avoid a contract. The degree necessary to produce this effect is fixed by the law, and must be made out by proof. All persons of lawful age are presumed to be capable of contracting, until the contrary is made to appear. So sanity is presumed, and if the contrary is alleged, it must be proved by the party imputing it. If a state of permanent insanity is once shown, the burden of proof shifts, and a lucid interval must be proved by the other side. But the rule is different in a case of temporary insanity, depending on some exciting cause not in perpetual action.

The general rule is, that "those who have not the regular use of their understanding sufficient to deal with discretion in the common affairs of life, or the weakness being so considerable as

to amount to derangement, are incapable of contracting a valid marriage, or making any other binding contract: Bishop on Mar. & Div., sec. 177.

Sir John Nicholl, in *Browning v. Reane*, 2 Phillim. 69, 1 Ecc. 190, as cited by Bishop, sec. 178, says: "If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract."

It is difficult to describe any exact, palpable line between legal capacity and incapacity. Perhaps this is impracticable as an abstract thing in reference to the ability to make a valid contract, as insanity subsists in various degrees, and the line of separation between it and mere imbecility is often faint and imperceptible. The general test is the fitness of the person to be trusted with the management of himself and his own concerns. Such a person has a disposing, contracting mind, although it may be in a degree impaired.

The proof in this case shows that the complainant has for a great many years labored under a disease, called by the doctors *prolapsus uteri*. This disease, when it becomes chronic, always more or less affects the mind. It may assume such a character as to destroy the intellectual faculties. Such was its effect upon the complainant in 1850, and from that to this time. Previous to 1850, it is very clear from the proof that she was only subject to paroxysms of the disease, with intervening periods of composure and sanity. There is much detail in the evidence in relation to her conduct during these paroxysms, commencing in the life-time of her first husband, and continuing up to the time of the total derangement of her mind in 1850. She was the subject of great delusions in the paroxysms of her physical disease; but when these attacks passed off, she was as rational as ever. These changes in her physical system account for the conflict in opinion in relation to her mental condition. Her delusion consisted in ungrounded and startling apprehension of conspiracies against her life by her own slaves, and her kindred and others. She imagined they were waylaying her house for the purpose of killing her—putting poison in her water, etc. She would prepare herself with pistols and guns on these occasions, shoot them off in the night, and often call for protection; she would become wild and excited, very loquacious, eccentric, and foolish, when the fits of this disease were

upon her. Much of her conduct on the subject of courtship and beaux, such as showing the love-letters of one suitor to another, and boasting about her conquests, and the like, was in very bad taste, and evinced great eccentricity of character. But if the exceptional conduct of either widows or widowers when they become anxious to marry is to be regarded as delusion, our lunatic asylum would have to be very much enlarged. Eccentricity of conduct or peculiarity of manners does not constitute insanity.

It is certainly very clear that this lady could not be regarded as permanently deranged until 1850. But there is as little question that she was occasionally and temporarily in that condition for ten or twelve years before that time. And the important question is, What was her mental condition at the time of her marriage with the defendant in 1847? There were only two persons present to witness the nuptial ceremony—her overseer, Bethune, and the justice of the peace, Daniel Farrar, who performed the marriage ceremony. The first gave his opinion that she was of unsound mind, and the latter thinks she was perfectly sound and sensible. They both witnessed all her acts and conduct on that occasion, on which they rely for their opinions, and arrived at different conclusions. The overseer remained in the house but a short time, but the magistrate staid all night, and until after breakfast next morning. He states that he had a great deal of conversation with her, and never thought of her being insane, but considered her sound and sensible.

It is in proof that she managed her own business from the death of her first husband up to the time of the marriage in question; that she contracted with her own overseer, bought land, sold slaves, purchased and made up her negro clothing, and evinced judgment and understanding in all her business transactions. She is proved to have been a neat and excellent housekeeper, both before and after her marriage with Cole. The proof is abundant on these points. The result of the whole body of the proof is, that she was subject to great mental aberrations when her disease assumed an aggravated form, which was frequent, and when relieved of that, her mind resumed its healthy action again until the recurrence of another paroxysm.

But if the proof established the fact that she was of unsound mind at the time of the marriage, there is abundant evidence that she was afterwards restored, at least temporarily, and did not repudiate, but her acts and conduct recognized the validity

of her marriage. A lunatic on regaining his reason may affirm a marriage celebrated while he was insane: 1 Bishop on Mar. & Div., sec. [189]; *Allis v. Billings*, 6 Met. 415; *Campbell v. Mesier*, 4 Johns. Ch. 333 [8 Am. Dec. 570]; and this without any new solemnization. If there is sufficient reason to apply this principle to deeds and other contracts of persons incapable of consent for infancy, there is surely a better and stronger reason to extend it to the contract of marriage.

If the treatment of the complainant by the defendant could have any effect upon the question in this case, as it certainly cannot, it would be found to afford no aid to the bill, as it has been kind and affectionate at all times.

Upon the whole case, we think the marriage, with all its incidents of rights and duties, was valid and binding on both parties, and affirm the decree of the chancellor dismissing the bill.

NEITHER OCCASIONAL PAROXYSMS NOR HEREDITARY INSANITY before marriage, and unknown to complainant, nor complete insanity after marriage, is ground for divorce: *Hamaker v. Hamaker*, 65 Am. Dec. 705. The principal case is cited in *McReynolds v. State*, 5 Coldw. 23, to the point that a lunatic on regaining his reason may affirm a marriage celebrated while he was insane, and this without any new solemnization.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

FULSHEAR v. RANDON.

[18 TEXAS, 275.]

PARTY IS BOUND BY WRITTEN CONTRACT, THOUGH HIS SIGNATURE DOES NOT APPEAR at its end. If his name, written by himself, appear in any part of the agreement, it may be taken as his signature, if it was written for the purpose of giving authenticity to the instrument, and thus operating as a signature.

PARTY IS BOUND BY CONTRACT MADE AND DELIVERED AS HIS AGREEMENT, when a person having authority signs the names of all parties to the instrument.

TO PUT PROOF OF EXECUTION OF CONTRACT UPON OPPOSING PARTY, it must be put in issue by the pleadings, under the provisions of the Texas statute.

WRITTEN CONTRACT, SIGNATURES of the parties to which appear to be in the same handwriting, is admissible in evidence.

ACTION upon a racing contract, the signatures to which were in the body of the instrument, and appeared to have been written by one party. Said agreement was offered in evidence, but was ruled out by the court, and plaintiff assigns this as error.

C. W. Buckley, for the appellant.

By Court, **WHEELER, J.** In order to bind a party to a written contract or agreement, it is not necessary that his signature should appear at the end of it. If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature: 2 Parsons on Cont. 287. In *Johnson v. Dodgson*, 2 Mee. & W. 653, where the question was whether there was a signing by the party within the provision of the statute of frauds, Lord Abinger said: "The

cases have decided that although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood; or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied—there being a note in writing showing the terms of the contract, and recognized by him." See *Merritt v. Clason*, 12 Johns. 102 [7 Am. Dec. 286]; *Clason v. Bailey*, 14 Id. 484; *Pennimon v. Hartshorn*, 13 Mass. 87. If the contract was made and delivered by the defendant as his agreement and undertaking, it would bind him; and it would make no difference that the same person may have written the signatures, if authorized thereunto by the parties. The defendant did not put in issue the making of the contract so as to put the plaintiff upon proof of its execution: Hart. Dig., art. 741. And it was no objection to the admission of the writing in evidence that the signatures of the other parties appeared to be in the same handwriting.

We are of opinion, therefore, that the court erred in sustaining the defendant's objection to the admission of the evidence, for which the judgment must be reversed and the cause remanded.

Reversed and remanded.

NOTE THOUGH NOT SIGNED at the bottom of the instrument, but at the end of the last sentence but one, is sufficiently signed to bind the party executing the note: *Prince v. Thompson*, 21 Tex. 481; and unless he deny the execution thereof under oath, he cannot object to its being read in evidence at the trial: *Closs v. Judson*, 34 Id. 289.

LINN v. WRIGHT.

[18 TEXAS, 317.]

ASSIGNOR, BY REMAINING IN POSSESSION OF GOODS to dispose of them as agent for the trustee, is deemed *prima facie* to have conducted himself in dealing with them in accordance with an understanding with his principal, who is bound to take notice of the manner in which the agent conducts himself in his employment, and who is presumed to have assented to his acts.

EMPLOYMENT OF DEBTOR AS AGENT OF TRUSTEE to use and control assigned effects in a manner inconsistent with the purposes of the trust, and as his own, is evidence that the assignment was not made in good faith.

ASSIGNMENT PROVED TO HAVE BEEN INTENDED TO SECURE PREFERRED CREDITORS, and those who had incurred liability as sureties of the

assignor, and also to secure to the assignor certain benefits out of the property to the hinderance of other creditors in the enforcement of their rights, is fraudulent and void as to the deferred creditors.

CIRCUMSTANCES NEED NOT BE SO CONCLUSIVE IN THEIR NATURE and tendency as to exclude every other hypothesis than the one sought to be established in order to authorize a jury to deduce from circumstantial evidence the conclusion of fraud.

QUESTION OF FRAUDULENT INTENT IS QUESTION OF FACT within the province of the jury to decide.

UNLESS THERE IS SOME REFERENCE OR DESCRIPTION to the property conveyed, either in the body of the trust deed or a schedule annexed to it, so as to render the property capable of being ascertained and identified, the deed will not ordinarily transfer title, but will be inoperative and void. This omission is, in some cases, a badge of fraud, which may, however, be repelled.

ABSENCE OF SCHEDULE CONTAINING DESCRIPTION OF PROPERTY, and prepared previous to the making of the deed of trust, is a suspicious circumstance, which, unless explained, or unless there is proof of what particular property was embraced in the assignment, is a sufficient ground to exclude the assignment from the consideration of the jury.

INSTRUCTIONS ARE NOT ERRONEOUS merely because they do not embrace every aspect in which the law applicable to the case might have been presented to the jury.

MERE OMISSION TO GIVE INSTRUCTIONS NOT ASKED, but which would have been proper, is not error.

UNDER TEXAS STATUTE, IN ORDER TO RENDER JUDGMENT in an action of replevin, it is essential that the value of the property should be ascertained, and the sheriff is required to assess its value when taking the bond required of the claimant. This estimate may be acquiesced in by the parties to the suit, and taken as the true value for the purpose of rendition and enforcement of judgment, but it has never been held that the estimate of value thus made was conclusive upon the parties.

WHERE IN ACTION OF REPLEVIN the issue made is the question in general terms of the claimant's right of property in the goods, and the only pleading before the court at that time is the claimant's answer, in which he does not plead his title or inform the opposing party or court on what title he intends to rely to maintain his claim to the property, but afterwards relies on a trust deed for that purpose, the opposing party must be allowed to impeach the validity of such deed.

REPLEVIN to try right of property in certain goods levied upon by virtue of executions in favor of defendants, and against one Chapman, and claimed by plaintiff as his property. Plaintiff, in his affidavit of claim, stated that the sheriff, by virtue of said executions, levied upon said goods as the property of Chapman; that the said goods were then in his (plaintiff's) possession, and in a storehouse known as Chapman's; that Chapman was at the time of the levy acting as the agent and clerk, and disposing of the goods, for and on the account of plaintiff; that he claims

said goods as his own; has a perfect title; that this claim is made in good faith; and that he is not a party in any of the said executions. The issue formed upon the affidavit, and under the direction of the court, was, Are the goods levied upon the property of Linn? At the trial, plaintiff introduced a deed of assignment from Chapman to himself, the consideration in which was that the plaintiff undertook to pay the claims which certain creditors had against Chapman. The deed named the claims and creditors and described the property, as stated in the opinion. Plaintiff then introduced one Phillips as a witness, who testified to being a witness to said deed; that it was executed by Chapman and plaintiff; that the goods named therein were the same that were delivered to plaintiff upon the execution of said deed; that the goods were in the hands of the sheriff, under attachment sued out against Chapman; that an agreement was made between Chapman and his attaching creditors that if he (Chapman) would find good security, they would release the goods; that plaintiff and certain others agreed to go his security, upon condition that he assign the goods to plaintiff in trust, with power to sell them in order to pay the debts for which they were security; that Chapman executed such deed, and the goods were released and delivered to plaintiff, who, with others, signed a note as security for Chapman. One Johnson was then sworn on behalf of plaintiff, and testified that he knew the goods mentioned in the assignment; that the goods replevied were a portion of the same goods; that at the time replevied they were in bad condition, greatly injured, and that in his estimation they were not worth more than one half of their first cost; that plaintiff, after the goods were replevied, sold them at auction; that he (witness) was present during the sale, and that the goods were sold for a fair price. The deposition of Chapman was then introduced on behalf of plaintiff. It stated that Chapman made the assignment for the purpose of securing plaintiff and others as his sureties on a note for the payment of claims for which his property had been attached; that when the attachment suits were settled, plaintiff was placed in possession of the goods as assignee, and that he had so continued in possession; that the goods remained in the same house after as before the assignment, and that plaintiff paid rent therefor, as also all expenses for selling the goods; that he (Chapman) was employed as agent of plaintiff, and was in no way connected with the goods after the assignment, except as agent, and as such received compensation from plaintiff; that

during the time he was employed as agent he supposed that the public knew that he was acting as such; and that though he might have signed instruments without adding the word "agent," or for "plaintiff as assignee," if this was done, it was through ignorance or from the habit of signing as principal; that all of the property owned by him was included in the assignment, and applied to the payment of the claims named therein. The jury were instructed that if they believed that the trust deed was made in good faith, and to protect the interests of Chapman's creditors, and that plaintiff took the goods to assist in carrying out the intention of Chapman, without any fraudulent intent on his part, or knowing of any such intent on the part of Chapman, then the assignment would vest the title to the property in plaintiff, and that the jury would so find; but that if they should find that a contrary intention and state of facts existed, then the assignment would be fraudulent, and the property in dispute subject to sale under the executions. The plaintiff asked the following instruction, which the court refused: "That if the jury found for the plaintiff, they should find the value of the goods replevied." The jury returned a verdict that the trust deed was made to delay the payment of creditors, and that the property was subject to execution. Judgment accordingly, and plaintiff appeals.

J. J. Holt, for the plaintiff in error.

F. S. Stockdale and W. S. Glass, for the defendants in error.

By Court, *WHEELER, J.* The principal questions respecting the admissibility of evidence to invalidate the assignment were determined when the case was before us on a former appeal. The rulings of the court appear to have been in accordance with the opinion then delivered in the case, and, it is conceived, the well-settled rules of evidence upon the question of fraudulent intent in the making of a deed. Unquestionably, the deed is to be received in the light of surrounding circumstances, in order to arrive at the real intention of the parties. Unquestionably the assignor, remaining in possession of the goods, to dispose of them as agent for the trustee, must be deemed, *prima facie* at least, to have conducted himself in his dealing with them in accordance with the understanding between himself and his principal. The latter was bound to take notice of the manner in which he conducted himself in his employment. What the agent did, the principal must be presumed to have assented to; and it is not unreasonable to suppose that parties had contem-

plated in advance a line of conduct, which they are shown to have pursued. Although the employment of the debtor by the trustee is not forbidden by law, yet "if he be permitted, as their agent, to use and control the assigned effects in a manner wholly inconsistent with the purposes of the trust, and as his own, it will be evidence that the assignment was not made in good faith:" Burrill on Assignments, 174; *Smith v. Seavitts*, 10 Ala. 92, 105.

The fair and natural inference deducible from the evidence is, that the dealing of the parties with the goods after the assignment was consonant with their intention and private understanding at the time of making it; and that it was intended not only to secure the preferred creditors and those who had incurred liability as sureties of the assignor, but also to secure to the assignor himself certain benefits out of the property assigned, to the hinderance of other creditors in the enforcement of their rights. That such a purpose will render the deed fraudulent and void as to the deferred creditors, does not admit of question. To warrant the jury in so finding, it was not necessary that the circumstances tending to that conclusion should have been incapable of being accounted for upon any other hypothesis. There is no such rule of evidence or principle of law as that, in order to authorize a jury to deduce, from circumstantial evidence, the conclusion of fraud, the circumstances must be of so conclusive a nature and tendency as to exclude every other hypothesis than the one sought to be established. If the evidence is admissible as conducing in any degree to the proof of the fact, the only legal test applicable to it upon such an issue is its sufficiency to satisfy the minds and consciences of the jury. The question of fraudulent intent is a question of fact, which it is peculiarly within the province of the jury to decide. They are the exclusive judges of the weight of evidence; and are to be guided in their decision by their conscientious judgment and belief, under all the circumstances of the case: 1 Stark. Ev. 474; *Briscoe v. Branaugh*, 1 Tex. 326. What amount or weight of evidence shall be sufficient proof of such intent can never be matter of legal definition. The law therefore refers the weight of evidence and the degree of probability to the jury; and the only test which can be applied is its sufficiency to produce a satisfactory conviction or belief in their minds.

Deeming the evidence, extrinsic of the deed, sufficient to warrant the verdict, it is unnecessary to decide upon the intrinsic validity of the instrument. It is not proposed, therefore, to

notice all the objections taken to it. But there is one which seems deserving of notice, especially as the court may again be required to pass upon it; that is, that the schedule referred to in the deed as containing a description of the property, and as being annexed to the deed, was not annexed, nor produced in evidence. There certainly should be a description of the property conveyed, either in the body of the instrument or in a schedule annexed to it. Without such a description, or some such reference as to render the property capable of being ascertained and identified, the deed will not ordinarily operate a transfer of the title. There must in general be some such description or reference to the property, or the deed will be inoperative and invalid. But it is immaterial whether it be given in the body of the instrument, or in a schedule annexed, to which reference is made. The latter is the usual method where the property is considerable in amount, or consists of a variety of particulars. "When schedules are intended to be prepared, and are referred to in the assignment, they should in strictness be prepared before the assignment is drawn, or, at any rate, be in readiness, so as to be annexed to the instrument before it is executed. In some cases, however, where time has not been allowed for the preparation of schedules, particularly those of the property assigned, an assignment executed without schedules, and only referring to them as 'to be made out and annexed' at a future time, has been adjudged valid:" Burrill on Assignments, 247. "If possible, these schedules should be completed and annexed to the assignment before execution; but this is sometimes dispensed with. The general rule on this subject appears to be this: that the mere omission to annex the usual schedules is not in itself sufficient to avoid the assignment. . . . In some instances, and when taken in connection with other circumstances, this fact of omission may be considered a badge of fraud. But the inference of fraud may be repelled by various circumstances. Thus in Massachusetts, where the assignment itself contained a proviso that schedules were to be made out as soon as might be, the presumption of fraud was held to be removed. So in New York, where full schedules were presented to the court in answer to a bill filed by a judgment creditor, the inference of fraud was held to be repelled. So if the property be described in the assignment with sufficient certainty to enable the assignee to take possession of it, the omission to annex a schedule, though provided for in the deed, will not render the assignment void. And if possession accompany the transfer, and the trans-

tion be in all other respects fair, the mere want of a schedule will not render it fraudulent. Want of a schedule is less suspicious where the whole of the assignor's property is conveyed for the benefit of all creditors, than where part of it is conveyed for particular creditors:" *Id.* 254-256. A mere imperfection in the description of the property will not have the effect of invalidating the instrument; and a description in general terms has frequently been held unobjectionable; as where the property was described as the cargoes of certain vessels named, without invoices, bills of lading, or valuation, and real estate lying in Boston, Charlestown, and Maine, without a particular description of each parcel, it was held that as the description could be made certain by the reference given, it was sufficient: *Id.* 240 et seq.

The authorities on this subject are reviewed at considerable length by Mr. Burrill's treatise, and the general rules deduced. The extracts and references we have given may suffice to indicate the law as applicable to the present case. The description of the property given in the deed is contained in the following clause: "All and singular my stock in trade, consisting of goods, wares, and merchandise, and named in the schedule hereunto annexed, dated August 24, 1852, marked 'B;' also all my notes and accounts due me by debtors, a schedule of which, with the names of the debtors, and the amounts due by them, respectively, is to be made and hereunto annexed, marked 'C.'" "All my stock in trade, consisting of goods, wares, and merchandise," is certainly very indefinite, but perhaps not so indefinite as to be incapable of being rendered certain by proof. But it seems the schedule of the twenty-fourth of August, containing a particular description of the property, had been prepared previously to the making of the deed, which bears date on the ninth of September following. Why the schedule was not annexed does not appear. Its absence is certainly a suspicious circumstance, and unless explained, or unless there was satisfactory proof of what property was included in the general reference "all my stock in trade," so that it might certainly appear for what the assignee is responsible—whether the property was not greatly more than sufficient to satisfy the preferred creditors, and what particular property was in fact embraced in the assignment—the court, it would seem, might well have sustained the motion of the appellees to exclude the assignment from the consideration of the jury; for undoubtedly it was the right of the deferred creditors to have all the security against abuse of the trust by the assignee which it was the apparent purpose of the deed to

afford, and to be fully informed as to the disposition which the assignor had made of his property. They ought not to be bound by any assignment which was effected in such a manner as not to enable them to hold the assignee or trustee responsible for all the property conveyed, or as to needlessly embarrass their remedy against him in case of his delinquency, or which in any manner concealed the real transaction, and rendered it, in any of its parts, not readily accessible to their observation, and the eye of the court, in case of the necessity of a resort to legal process for the protection of their rights.

It is not perceived that there is anything in the charge of the court which is erroneous, or was calculated to mislead the jury. Instructions will not be deemed erroneous merely because they do not embrace every aspect in which the law applicable to the case might have been presented to the jury. If the charge of the court was thought to be imperfect or incomplete in its presentation of the law of the case, it was the right of the party to supply any supposed omission or imperfection by asking the proper instruction. Where this has not been done, the mere omission of the court to give instructions which would have been proper is not error. The word "delay" was evidently employed in the charge of the court, and was doubtless understood by the jury, in the sense in which it is used in the statute; not merely in reference to a question of time, but to the interposition of obstacles in the way of creditors, with the fraudulent intent to hinder and delay. In that sense, it was properly held to invalidate the assignment: Burrill on Assignments, c. 22.

Without deeming it necessary to examine more particularly at present the errors assigned in reference to the ingenious and able argument of counsel for the appellant, on the question of the validity of the assignment, we conclude that they disclose no sufficient ground for reversing the judgment.

But in the ruling of the court refusing to instruct the jury to find the value of the property, we are of opinion there is error. In order to render the judgment contemplated by the statute, Hart. Dig., art. 2818, it is essential that the value of the property should be ascertained. In taking the bond from the claimant, the sheriff is required to assess the value of the property: Id., art. 2814. But this, it seems evident, was intended for the purpose of fixing the amount of the bond to be given by the claimant. Where the parties acquiesce in the estimate of value adopted by the officer, it has been held that it might be taken to be the true value, for all the purposes of the rendition and

enforcement of the judgment: *Wright v. Henderson*, 12 Tex. 43. But it has never been supposed that the sheriff's estimate of the value was conclusive upon the parties. The contrary opinion has been entertained: *Id.* 46. The subject will be found to have been sufficiently examined in a case decided at the last term at Tyler, *Lewis v. Taylor*, 17 Tex. 57, upon the construction of the seventh section of the statute: Hart. Dig., art. 2820.

As the case will be remanded, it is proper to notice the objection that the issue was not properly made, so as to admit evidence to impeach the assignment as fraudulent. Although the statute provides that the court shall direct the issue to be made up, Hart. Dig., art. 2816, yet the form and manner of making it are left to the parties. The issue was accordingly made, propounding the question, in the most general terms, of the claimant's right of property in the goods. The only pleading before the court, at the time of forming the issue, was what purports to be the claimant's answer, in which he did not plead his title, or notify the plaintiffs or the court on what title he intended to rely to maintain his claim to the property. Not having pleaded his title, the plaintiffs could not be required to plead in avoidance of it; nor could other issues be made than that which was made, upon the bare claim of property. The issue was what the claimant made it; and under such an issue, the greatest latitude of proof must necessarily be admitted. The plaintiffs could not be required to anticipate the claimant's evidence of title, and plead to it; they are not supposed to have known in what it consisted. When produced in evidence, they must be allowed to introduce evidence to impeach its validity.

It does appear that after the issue was made up, the claimant filed an "amended answer," in which he pleaded specially his title. But it does not appear to have been by leave of the court; nor does it appear that either the plaintiff or the court had notice of it. After the formation of the issue under the statute, the parties were not bound to anticipate further pleadings; and unless in some manner brought to the attention of the court, or the notice of the party in time to reply to or take issue upon them, they cannot properly be considered as changing the issues previously formed, or as affecting the right to introduce evidence applicable to those issues. Had the claimant pleaded his title in the first instance, or had his amended answer been filed before the issue was made up, or had it been brought to the notice of the court and the opposite party when filed, the latter might have been required to plead specially the matter relied on

to invalidate it, in order to the formation of the appropriate issues, and the admission of evidence to impeach the title. But the case must be viewed as having gone to trial upon the issue as made up by the parties under the direction of the court; and upon the state of the record, to admit the deed of assignment in evidence, and then to have excluded the evidence offered to invalidate it, would have operated a surprise, and manifest injustice to the plaintiffs. The objection to evidence, therefore, on the ground of its supposed want of relevancy to the issue, was not well taken.

But because the court erred in excluding evidence of the value of the property, and refusing to instruct the jury, at the instance of the claimant, to find its value, the judgment must be reversed and the cause remanded.

Reversed and remanded.

ASSIGNMENT IS VOID WHICH DOES NOT SECURE EQUAL DISTRIBUTION among the creditors, but reserves a portion to the assignor: *Pike v. Bacon*, 38 Am. Dec. 259, and notes 263, collecting prior cases; *Anderson v. Fuller*, 36 Id. 290; *Kuykendall v. McDonald*, 57 Id. 212, and note 216, collecting cases on the effect of retention of possession by vendor after assignment.

FRAUD MAY BE PROVED BY CIRCUMSTANTIAL or presumptive evidence: *Briscoe v. Bronaugh*, 46 Am. Dec. 108, and note 120; *Burch v. Smith*, 65 Id. 154, note 157. The proof in such cases must be satisfactory: *White v. Trotter*, 53 Id. 112, note 125. Circumstances need not be of so conclusive a nature and tendency as to exclude every other hypothesis than the one sought to be established, in order to authorize a jury to deduce from circumstantial evidence the conclusion of fraud: *Sparks v. Dawson*, 47 Tex. 146, citing the principal case.

FRAUDULENT INTENT IS QUESTION FOR JURY: *Briscoe v. Bronaugh*, 46 Am. Dec. 108; *Billings v. Billings*, 56 Id. 319; *Kuykendall v. McDonald*, 57 Id. 212; *Burch v. Smith*, 65 Id. 154, and citations in notes to these cases. Specific, malicious, covinous, guileful intention to hinder, delay, and defraud creditors is a question of fact, to be ascertained upon evidence, as other facts are when submitted to a jury: *Baldwin v. Peet*, 22 Tex. 717.

JUDGE IS NOT BOUND TO PRESENT CASE IN EVERY ASPECT of which it is susceptible on the evidence: *Sidwell v. Evans*, 21 Am. Dec. 387; *Krauffman v. Greisemer*, 67 Id. 437. Instructions will not be deemed erroneous because they do not embrace every aspect in which the law might have been presented to the jury: *Thompson v. Payne*, 21 Tex. 625, citing the principal case.

IT IS NOT ERROR TO OMIT TO GIVE INSTRUCTIONS NOT ASKED: *Moses v. Boston and Maine R. R.*, 64 Am. Dec. 381, and citations in note 393.

ASSIGNMENT MAY BE HELD INVALID WHERE THERE IS NO DESCRIPTION of the property by schedules or otherwise, such as will lead to its being ascertained or identified: *Baldwin v. Peet*, 22 Tex. 720; but when the description is made certain by some other means than a schedule or other specific description, need not be given, however advisable that this be done: *Crow v. Red River Co. Bank*, 52 Id. 368, all citing the principal case.

TRUST DEED OF ENTIRE CAPITAL STOCK of a firm made six months prior to their being declared bankrupt, and not recorded, providing for the retention of possession of the property by them, with power to sell in the ordinary course of trade and pay the claims of certain creditors, is not *per se* void on the ground of fraud: *Scott v. Alford*, 53 Tex. 92.

FRANKLIN v. COFFEE.

[18 TEXAS, 413.]

HOMESTEAD NECESSARILY INCLUDES IDEA OF HOUSE OR RESIDENCE of some sort, and the exemption guaranteed by the law and constitution of Texas is based upon the supposition that there is a homestead in fact; a home in which the citizen and his family are or might be domiciled, and that it does not consist of land merely.

WHERE HOME, RESIDENCE, OR SETTLEMENT HAS ONCE BEEN ACQUIRED ON lands it is not necessary that there should be continuous actual occupation to secure the homestead from forced sale; an absence temporary in its nature, and not designed as an abandonment, will not work a forfeiture of the right.

IN ORDER TO SECURE HOMESTEAD EXEMPTION, it is not necessary that a house should be actually built or improvements made upon the land; but there must be a preparation to improve, and of such a character and to such an extent as to manifest beyond doubt an intention to complete the improvements and reside upon the place as a home.

UNDER STATUTORY PROVISIONS OF LAW of Texas, the various articles of personal property exempt from execution secured to the debtor must exist, and he must be the owner of them, before the benefit of the statute can be claimed by him.

THE opinion contains the facts.

J. T. Harcourt, for the appellant.

W. R. Jarmon and Fred. Tate, for the appellees.

By Court, HEMPHILL, C. J. The appellant, Nicholas Franklin, was the owner of a tract of land a few miles from the town of Lagrange. He had not resided upon the land before his marriage; and since his marriage he had lived, under some arrangement, at the house of his mother-in-law in the town. Eight or ten years ago there was a small cabin built upon the land, and a patch of two or three acres inclosed. There was no evidence that the improvements were made by or for Franklin. A witness thought that another person whom he named made the improvements. A free negro occupied the cabin for a short time. The improvements, viz., fence and cabin, remained on the land only one season, and no one would now know that the land had ever been improved. The land was sold at sheriff's

sale, and appellants, viz., Franklin and his wife, sue to set aside the sale, on the ground that the land was the only tract owned by them; that it was their homestead, and as such was exempted from forced sale under execution. It was in proof that Franklin had appeared at the sheriff's sale and given notice that whoever bought the land would buy a lawsuit.

A jury was waived, and the cause being submitted to the court, judgment was given for the defendant.

That the homestead exemption was founded upon principles of the soundest policy cannot be questioned. Its design was not only to protect citizens and their families from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals those feelings of sublime independence which are so essential to the maintenance of free institutions.

These are noble objects; and such construction, consistent with the spirit of the provision, should be given, as would promote and secure the purpose intended. But the exemption guaranteed by law and the constitution is based upon the supposition that there is a homestead in fact, in actual existence; that there is a home in which the citizen and his family are or might be settled. We are called upon in this suit to extend the exemption, and declare that land upon which the owner never resided, never used, or attempted or was preparing to use, as a home, and which is in fact wild and uncultivated, should be regarded as a homestead, and as such protected from execution. We cannot assent to the proposition that this land should be considered as a homestead. The proposition would have been sound had the constitution declared that two hundred acres of land belonging to a head of a family should be exempted from forced sale. But such is not the provision. The homestead, not to exceed two hundred acres, is declared to be exempted. There must be a homestead over which the constitution may throw its shield, and not land merely, upon which the owner may or may not put his cabin, mansion, or improvements, and claim as a home.

A homestead necessarily includes the idea of a house for residence or mansion-house. On town or city lots it cannot exceed a certain value. But on the rural homestead there is no such restriction. The dwelling may be a splendid mansion, or a mere cabin or tent, open to the winds and rains of heaven. If there be either, it is under the protection of the law; but there must be a home residence before the two hundred adjoining acres can be claimed as a homestead. Where a home residence or settle-

ment has once been acquired on lands, it would not be necessary that there should be continuous, actual occupation, to secure the land from forced sale. If the citizen or family should leave in search of another home, the first would remain until the second should be acquired. If a husband remove his wife and family into another county, and without providing them a home abandon his wife, she might again resume possession of the homestead: *Fullerton v. Doyle*, 18 Tex. 3. And no absence, on pleasure or business, temporary in its nature, and not designed as an abandonment, would work a forfeiture of the right. Nor would it be necessary to secure the exemption that a house should be built or improvements made. But there must be a preparation to improve, and this must be of such a character and to such an extent as to manifest, beyond a doubt, the intention to complete the improvements and reside upon the place as a home.

By law, various articles, in addition to the homestead, are exempt from execution; as, viz., furniture, tools of trade, cows, hogs, etc. But these must exist in fact before the benefit can be claimed. The law provides that these articles shall be secured to the debtor out of his property, but that is only in the event that he is the owner of such articles. This rule prevades the entire exemption. It becomes operative only when the specific articles which it covers are in actual existence as the property of the debtor.

The rule is reversed where the claim is for the benefit of the widow and children out of the estate of the decedent. But that has no application where debtors are claiming exemption in their own right.

In this case there was no house or home upon the land. The plaintiff had not resided there before or since his marriage. He had made no preparation, or done no acts, which would evince a fixed intention and purpose to select and appropriate the place as a home; and we are of opinion that there is no error in the judgment, and that the same be affirmed.

Judgment affirmed.

WHAT OCCUPATION NECESSARY TO CONSTITUTE HOMESTEAD: *Charles v. Lamberson*, 63 Am. Dec. 457, and note 463; *Walters v. People*, 65 Id. 730; note to *Taylor v. Hargous*, 60 Id. 606.

WHAT ABSENCE WILL WORK ABANDONMENT OF HOMESTEAD: *Stewart v. Mackey*, 67 Am. Dec. 906, and cases cited *supra*.

HOMESTEAD NECESSARILY INCLUDES IDEA OF HOUSE OR RESIDENCE: *Scott v. Dyer*, 63 Tex. 137; and if the owner does not reside upon the premises, it

is not his homestead, and is liable to be sold at forced sale: *Walker v. Darr*, 31 Id. 685 (homestead cases); but it is not necessary that a house be built or improvements made upon the land to secure it as a homestead; however, there must be such preparation to improve as shows beyond doubt an intention to reside upon the place as a home, and complete the improvements: *Moreland v. Barnhart*, 44 Id. 280; *H. & G. N. R. R. Co. v. Winter*, Id. 611; *Barnes v. White*, 53 Id. 631; *Scott v. Dyer*, 60 Id. 138, all citing the principal case.

MERE REMOVAL OF HUSBAND AND WIFE from land will not operate *ipso facto* as an abandonment of it as their homestead: *Thomas v. Williams*, 50 Tex. 273, citing the principal case, which is cited in *Howard v. Marshall*, 48 Id. 478, to the point that the constitution of Texas, when using the words "homestead" and "family," did not contemplate that the parties occupying it should be composed of a family who were neither related by blood nor connected by marriage.

SMITH v. PERRY.

[18 TEXAS, 510.]

UNDER TEXAS STATUTE, SHERIFF WHO FAILS TO RETURN EXECUTION as directed by law is *prima facie* liable to the plaintiff in the execution for the full amount of the debt, interest, and costs; but this is not conclusively the measure of damages. The officer may avoid the liability by proving a reasonable excuse for his failure to make the return, or that the plaintiff has sustained no injury. The burden is, however, upon him to so prove; and where he pleads that the judgment debtor was insolvent, and that consequently the plaintiff has sustained no injury, he may be held liable for nominal damages and costs.

SUIT against Smith and his sureties for the failure of Smith, as sheriff, to return two executions in favor of plaintiffs. Plaintiffs' judgments were recovered at the spring term, 1853; executions were issued thereon returnable at the next term. This action was commenced in November, 1854, and defendant proved that the judgment debtors named in the executions were insolvent, and had no property out of which to satisfy said judgments. Notwithstanding this defense, the court gave judgment for the plaintiffs.

J. H. Robson, for the plaintiffs in error.

G. W. Smith, for the defendants in error.

By Court, WHEELER, J. In the rendition of judgment, the court evidently proceeded on the ground that the insolvency of the defendants in execution, and the fact that the plaintiffs had sustained no injury by reason of the default of the sheriff, did not affect their right under the statute, Hart. Dig., art. 1346, to have judgment against him and his sureties for the full

amount of the debt, interest, and costs. The judgment can only be supported on the ground that the statute fixes absolutely the measure of the plaintiffs' damages; and it makes no difference that they have not been injured by the default of the sheriff; they are entitled to their judgment, irrespective of the question of injury. If this view of the law be correct, it would make no difference though after the issuance of the execution the debt had been paid. The principle upon which the liability of the officer is made to rest would apply as well to that case as the present. The contrary, however, was decided in the case of *Hamilton v. Ward*, 4 Tex. 356. The primary object of the statute was held to be to give compensation to the party for the injury occasioned by the default of the officer; and where no injury had been sustained, it was held there could be no right to compensation. Accordingly, it appearing that after the default the plaintiff had been paid his debt, it was decided that he could not proceed against the sheriff for failing to return the execution. And in *Underwood v. Russell*, Id. 175, it was held that although the statute did not, in express terms, admit of any excuse for the default of the officer, yet it must be intended that a reasonable excuse would be heard; and such excuse was there held to acquit the sheriff of liability. The construction which these cases have put upon the statute, and which we see no cause to depart from in the present case, is, that a sheriff who fails to return an execution as directed by law is *prima facie* liable to the plaintiff in execution for the full amount of the debt, interest, and costs. That, *prima facie*, is the measure of the plaintiff's damages. But it is not conclusive; and the officer may avoid such liability by proof showing a reasonable excuse for his failure to return the execution, or that the plaintiff has sustained no injury. The burden of proof is upon the officer; and in a case like the present, he may be held liable, at all events, for nominal damages and costs, as in the case of an ordinary action against him: Sedgwick on Damages, 2d ed., 509. In *Hamilton v. Ward*, *supra*, we held otherwise; but there the debt had been fully paid and satisfied before the proceeding against the sheriff was commenced. There was not even an apparent right of action at the time of instituting the proceedings, which distinguishes that from the present case.

Where, under statutes similar, perhaps, to ours, the insolvency of the judgment debtor has not been admitted as a defense or in mitigation of damages, the party who would proceed against the officer for a failure to return the execution is

required to institute his proceeding promptly; otherwise he is barred of his remedy. Here it is provided by statute that the motion against the sheriff and his sureties may be made at any time within five years from the day on which the execution was returnable: Hart. Dig., art. 2378; and but three days' notice is required to be given of the motion: Id., art. 1346. The only security which the officer has, where he has made due return of the execution, is that the clerk will do his duty in recording the return and preserving the evidences of it. It is not improbable that the officer, summoned to answer upon so short a notice, years after the alleged default, and after he has gone out of office, may sometimes be placed apparently in default when really he had performed his duty. The temptation to seek to fix liability upon him will, of course, be in proportion to the difficulty of collecting the debt from the judgment debtor. In Kentucky, where, it seems, the insolvency of the defendant in execution has not been admitted as a defense under their statute, the court on one occasion remarked that executions have sometimes issued against men hopelessly bankrupt, with no other design than to take advantage of some possible slip or omission of the officer of the law: *Per Robertson, C. J., in Maury v. Cooper*, 3 J. J. Marsh. 224. We might expect to witness similar abuses—and the opportunities for practicing them would be greater here, owing to the greater length of time allowed within which to make the experiment—if the officer were to be held liable at all events. Sheriffs should be held to a strict accountability; and wherever injury has or may have resulted to a party, from neglect of duty by themselves or their deputies, they and their sureties should be made responsible. But the officer ought not to be subjected to such perils and penalties for mere technical defaults, where no one has been injured, as that no discreet or judicious man would be willing to take upon himself the responsibility of the office. It cannot be supposed that the legislature intended, nor does the language of the statute require, a construction which would impose such penalties for the benefit of those who have not been injured by the dereliction of the officer. The primary object of the statute must have been to afford a redress for injuries. It could not have been intended to hold out a temptation, and afford the opportunity, to those who had sustained no injury, and consequently could have no real ground of complaint, to speculate upon the derelictions of the officer. If the primary object had been to impose a penalty by way of punishment, it would not have been

provided that the penalty should go to the plaintiff in execution, in cases where, not being an injured party, he could have no right to claim it. It provides that for failing to return an execution on the day and at the place the same shall be made returnable, the sheriff "shall be liable to pay the plaintiff in execution the full amount of the debt, interest, and costs." But it does not necessarily result that he shall be so liable at all events, although he may have a reasonable excuse, and although the plaintiff may have a reasonable excuse, and although the plaintiff has not been injured or hindered in the collection of his debt. It goes upon the general presumption that the debtor is solvent, and that the neglect of duty will result in injury. But where the opposite is shown to be the fact, the case does not come within the object and policy of the law. If, therefore, the question were an open one, we think the construction heretofore placed upon the statute, by the cases to which we have referred, the true construction. The present case comes clearly within the principle of those decisions; conformity to which requires that the judgment be reversed, and the cause will be remanded for a new trial.

Reversed and remanded.

LIABILITY OF SHERIFF FOR FAILURE TO RETURN EXECUTION: *Hall v. Brooks*, 30 Am. Dec. 485; *Laflin v. Willard*, 26 Id. 629; *Commonwealth v. Magee*, 49 Id. 509, and note 513.

MEASURE OF DAMAGES AGAINST SHERIFF FOR NON-RETURN OF EXECUTION: *Evans v. Governor*, 54 Am. Dec. 172, note 176, and cases cited *supra*.

INSOLVENCY OF DEFENDANTS IN EXECUTION is not equivalent to "proper official diligence" on the part of the sheriff, and is not a good defense for him in an action for failure to levy and return an execution: *Vaughan v. Warnell*, 28 Tex. 121, citing the principal case.

WATKINS v. WALKER COUNTY.

[18 TEXAS, 585.]

ROAD OVERSEER MAY, WITHOUT BECOMING TRESPASSER, GO UPON ADJACENT LAND and take timber trees for road purposes, when the amount taken does not materially injure or impair the value of the land.

OWNER OF LAND IS ENTITLED TO COMPENSATION FROM COUNTY FOR TREES taken from his land by road overseer to repair road.

ROAD OVERSEER IS LEGALLY CONSTITUTED AGENT of the county from which he receives his appointment, and the county is liable in its corporate capacity for any acts done by him in the proper and necessary exercise of the authority conferred upon him.

PETITION alleging that one Whitehead, after being appointed and acting as a road overseer in Walker county, entered upon petitioner's land without his consent, and cut therefrom three thousand timber trees for the purpose of repairing a road; that the trees so cut were of the value of twenty cents each; that the land, amounting to sixty acres, from which the trees were cut, was mostly valuable for the trees upon it; and that by the cutting from it of the trees its value had been reduced to fifty cents per acre; that its original value was seven dollars per acre. Wherefore the petitioner prayed damages in the sum of five hundred dollars. There was judgment by default, and a jury assessed the damages at twenty dollars. The default was then set aside, and a demurrer and answer filed, the demurrer was sustained, the petition dismissed, and petitioner appeals.

Leigh and Baker, for the appellant.

A. M. Branch, for the appellee.

By Court, **WHEELER, J.** The fact that the jury impaneled to assess the damages, when there was no defense, estimated the plaintiff's damage at no more than twenty dollars, renders it probable that a very different case was presented by the evidence from that stated in the petition. But in revising the ruling of the court sustaining the demurrer, the matters contained in the petition must be taken to be true as therein stated; and the question is, whether they are sufficient to entitle the plaintiff to maintain his action.

For the appellee it is insisted that the plaintiff has no right of action; for, that a private mischief is to be endured rather than a public inconvenience; and the right of eminent domain gives to the legislature the control of private property for public uses. And the legislature have declared that "when to the overseer of the roads it may appear expedient to make causeways and build bridges, the timber most convenient may be used:" Acts 5th Legis. 140, sec. 17.

It is true that there are cases in which the rights of property must be made subservient to the public welfare. There may be cases where the right of the public rests upon a principle of necessity, which will justify the appropriation or destruction of private property without rendering the public liable to make reparation. If a public highway be out of repair, the passengers may lawfully go through an adjoining private inclosure. It is lawful to raze houses to the ground to prevent the spreading of a conflagration. These, it is said, are cases of urgent

necessity, in which no action lay at common law by the individual who sustained the injury. And it is true, too, that the right of public domain, or inherent sovereign power, gives to the legislature the control of private property for public uses. Roads may be cut through the lands of individuals without their consent; and timber may be taken from the adjacent lands to make the necessary causeways and repairs, without the consent of the proprietor. But to this right there is, in this state, a qualification annexed by the declaration in the bill of rights, that "no person's property shall be taken or applied to public use without adequate compensation being made, unless by the consent of such person." And provision has been made by law for ascertaining the injury occasioned by establishing a road through cultivated or inclosed land, and making compensation: Hart. Dig. 854; Acts 5th Legis. 37, 38, secs. 6 et seq. There are similar declarations and provisions in the constitutions and laws of most of the other states. It is held to rest with the legislature to judge of the cases which require the application of the right of eminent domain. It may be applied to roads, canals, ferries, bridges, etc., provided there be in the assumption of the property evident utility and reasonable accommodation as respects the public. But real property is held by grant from the government; and it would be a violation of the contract, and repugnant to the constitution, to appropriate it to public use without compensation to the owner. This has become an acknowledged principle in most of the states, and I presume in all whose constitutions contain similar declarations to our own. There is no such provision in the constitution of South Carolina; and it was there held that the legislature had the right to cause roads to be opened, and materials taken for keeping them in repair, without the consent of the owner, and without making compensation. But the court were not unanimous in this opinion. Some of the judges expressed dissatisfaction with the decision in so far as it claimed for the legislature the power, without accompanying its exercise with compensation, and especially the delegation of such power to the commissioners of roads: *State v. Dawson*, 3 Hill (S. C.), 100. I am not aware that such a power is claimed for the legislature in any of the states whose constitutions contain the restriction upon the power which ours does.

It is contended by counsel for the appellant in this case that, a highway being but a public easement, the freehold remaining in the original owner, and the public having only the right of

passing and repassing, and as incident thereto the right of digging earth and felling trees for its repair, this incidental right of the public comprehends only such uses of the property of the owner of the soil over which the road passes as are necessary to the enjoyment of the easement, and "which in their exercise will not interfere with individual rights, to the material detriment and injury of private property; and that where the necessary exercise of such right without the consent of the owner operates to the serious injury or spoliation of private property, the bill of rights secures to the party injured an adequate compensation for the injury sustained." In this we concur with counsel; and as presented by the petition, the present is a case which, upon this principle, clearly entitles the plaintiff to compensation. We do not suppose the legislature intended by the provision respecting the taking of timber, to which we have referred, the infraction of so clear a constitutional principle; or to claim the right to take private property for public use without making compensation to the owner. If such were the intention, the act in so far is plainly unconstitutional and void. But it was probably only intended to protect the overseer from becoming a trespasser, in going upon the adjacent lands and taking timber for the purposes of the road, where it would not be so considerable in amount and value as materially to injure or impair the value of the lands from which it was taken. This we suppose the legislature might very well do; for the constitutional restriction was not intended to protect the owner from a mere trespass upon his property, but from having it taken from him and appropriated to the use of the public without compensation.

It is not necessary at present to ascertain with more precision the extent or limit of the rightful exercise of the right of eminent domain in cases like the present; or to decide more than that the case, as stated, appears to be such as to give a right of action against the county for compensation for the injury which the plaintiff claims to have sustained. Should it become necessary when the evidence is brought before the court, the subject may be further more particularly considered with reference to the facts of the case. The duty of providing highways for the use of the public has been confided to the counties. The overseers of roads are the legally constituted agents of the counties from which they receive their appointment, and what they do in the proper and necessary exercise of the authority conferred upon them, the county in its corporate capacity is responsible

for. The action appears to have been well brought under the statute: Hart. Dig., arts. 206 et seq.; and we are of opinion that the court erred in sustaining the demurrer, and that the judgment be reversed and the cause remanded.

Reversed and remanded. —

(OWNER MAY SUE COUNTY for an injury done to his land through the action of its county commissioners' court in establishing a public road: *Hamilton County v. Garrett*, 62 Tex. 603, citing the principal case.

WALL v. STATE.

[18 TEXAS, 682.]

PARTY INDICTED FOR MURDER IS NOT ENTITLED TO CONTINUANCE of his trial, on the ground of the absence of an important witness, where his affidavit for such continuance fails to show that he had asked for a subpoena for the witness, or that he knew of no other witness by whom he could prove the same facts.

DEFENDANT IS NOT ENTITLED TO DEMAND POSTPONEMENT OF TRIAL as a matter of legal right, in order to afford him an opportunity to find persons who would join him in an affidavit to obtain a change of venue.

INDICTMENT, IN COMMON-LAW FORM, CHARGING MURDER to have been committed feloniously, willfully, and of malice aforethought, is sufficient to sustain a conviction of murder in the first degree, under the Texas statute.

GENERAL PRINCIPLE IS, THAT IF STATUTE CREATING OFFENSE IS REPEALED, no further proceeding can be taken under the repealed law to enforce the punishment after the repealing act takes effect.

PENAL CODE OF TEXAS, IN REPEALING FORMER LAWS and abolishing common law, has neither changed the law defining the degrees of murder nor the punishment to be administered upon conviction thereof; hence appellate court may affirm a judgment of conviction which has been regularly rendered, although the repealing act took effect pending the appeal.

INDICTMENT for murder in the common-law form. The killing took place on the twenty-ninth of May. An indictment was found, and defendant was arrested on the following day. A copy of the indictment was handed to the prisoner on the day of his arrest; on June 2d a special venire was summoned, and a list of the jurors handed defendant; on June 3d the case was called for trial, and the prisoner produced his affidavit, and moved for a continuance, upon the grounds that he could not safely go to trial for want of the testimony of a witness by whom he expected to prove that deceased had made threats against his life; that said witness had not been summoned because the indictment had been so recently found; that defendant had had

no time in which to subpoena him. Defendant further asked for a continuance in order to give him an opportunity to find those willing to join him in an oath asking for a change of venue, he not believing that justice will be done him in the county where the indictment was found; and that, because of his confinement and the short time elapsing since the finding of the indictment, he has had no opportunity to find those friendly to him, and upon whose opinion he could rely; also, that he believes that if a continuance is granted, he can find testimony beneficial to him at his trial. The motion for a continuance was overruled, and the trial proceeded. In addition to the charge given by the court, the defendant asked that the jury be charged that under the indictment as framed the prisoner could not be found guilty of murder in the first degree. This was refused. The jury returned a verdict of murder in the first degree. Defendant's motion for a new trial was overruled, as was that in arrest of judgment, on the ground that the indictment was for murder in the second degree. Judgment was then rendered, and defendant appealed.

B. O. Franklin, for the appellant.

James Willie, attorney-general, for the appellee.

By Court, *WHEELER, J.* The application for a continuance manifestly showed no sufficient legal ground to entitle the defendant to a postponement of the trial. It does not appear that he had so much as asked a subpoena for the witness. If he had done this, after the service upon him of the copy of the indictment, for aught that appears, the attendance of the witness might have been procured. But if the witness had been present, his testimony would have been of no avail to the defendant. It was proposed to prove by him mere threats of the deceased, which, if proved, would have been no extenuation of the crime. Moreover, the affiant did not state that he knew of no other witness by whom he could prove the same facts. It is scarcely necessary to say he was not entitled to demand a postponement of the trial, as a matter of legal right, in order to afford him an opportunity of seeing if he could not find other evidence, or persons who would join him in an affidavit to obtain a change of venue. There is no error in the ruling of the court refusing a continuance.

The sufficiency of the indictment to warrant a conviction of murder in the first degree under the statute is not an open question. In *Gehrke v. State*, 13 Tex. 568, this court decided that an

indictment for murder, in the common-law form, charging the offense to have been committed feloniously, willfully, and of malice aforethought, was sufficient to sustain a conviction of murder in the first degree. The question was again earnestly pressed upon the consideration of the court in the case of *White v. State*, 16 Id. 206. But the first opinion was adhered to. We might content ourselves with a reference to these decisions as having put the question at rest in this court. But as the objection is again urged, it will not be out of place to refer to a few decisions in our sister states which show that what is the settled law of this court is also the well-settled doctrine of other courts upon statutes similar to our own, and that it is rightly settled upon principle.

The statute of Tennessee distinguishes the degrees of murder, and defines murder in the first degree in terms nearly identical with those employed in the statute of this state, as any "willful, deliberate, malicious, and premeditated killing:" Laws of Tenn. 316; Act of 1829, sec. 3; Whart. Crim. L. 418. And in *Mitchell v. State*, 5 Yerg. 340, the supreme court of that state held an indictment for murder in the common-law form sufficient to sustain a conviction of murder in the first degree, under the statute. The question was again raised in the later case of *Hines v. State*, 8 Humph. 597, and it was then said by Judge Green, delivering the opinion of the court, that the construction which was given to the statute in Mitchell's case, in 5 Yerger, had met with such general approval by the profession, that the decision had never been questioned in that court until in the case then before them; and that they regard it as the settled law of the court, not now open for debate.

The statute law of Pennsylvania contains a like definition of the degrees of murder: Whart. Crim. L. 355; and it is there held that it is not necessary that the indictment should so describe the offense as to show whether it be murder of the first or second degree, and that an indictment for murder in the common-law form is sufficient to support a conviction of murder of either degree. The reasoning of Chief Justice Tilghman, in *White v. Commonwealth*, 6 Binn. 179 [6 Am. Dec. 443], is equally applicable to our statute, and shows very satisfactorily that there is nothing in the statute which requires any change in the form of the indictment, but that it is plain none was contemplated. The general principle is recognized that where a statute creates an offense, the indictment must pursue the statutory definition in charging the offense, and must charge it to

have been done against the form of the statute. But where the statute only inflicts a penalty upon that which was an offense before, it need not be so laid, because in truth the offense does not consist in a violation of the statute. The act does not create the crime of murder; nor, so far as concerns murder in the first degree, does it alter the punishment, which was always death. All that it does is to define the different degrees of the crime, and regulate the punishment accordingly. It is plainly taken for granted by the act itself that it would not always appear on the face of the indictment of what degree the murder was, because the jury are to ascertain the degree by their verdict. But if indictments were to be so drawn as to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner guilty in the manner and form as he stands indicted: *Id.* 182, 183.

The revised statutes of New York contained a definition or description of the crime of murder under three classes of cases, the first being "when perpetrated from a premeditated design to effect the death of the person killed, or of any human being." And in *People v. Enoch*, 13 Wend. 159 [27 Am. Dec. 197], the supreme court held an indictment charging the offense in the common-law form, instead of charging it to have been perpetrated from a "premeditated design to effect the death of the person killed," sufficient. The court said: "We may concede that this indictment must be sustained, if at all, by charging the offense defined in the first subdivision [above quoted], because if proof of express malice was not admissible under it for that purpose, proof of implied malice would not be. We may also concede the general principle applicable to indictments founded upon statutes, that it is necessary to set forth all the facts and circumstances which constitute the offense as defined in the act, so as to bring the offender clearly within the statutable offense." The same principle applies where an offense at common law has been raised by statute by increasing the punishment, as where the benefit of clergy has been taken away, or a misdemeanor has been raised to a felony. But the application of this principle to the case is not admitted, for the statute has not altered the common law. The offense of murder as defined in the statute was such before the statute. There is no new offense created by the statute, nor a new punishment annexed to an old offense. The case therefore does not fall within the rule, nor the reason of the rule, supposed to be violated by the form of the indictment. The court conclude: "The rule

that the indictment should bring the offense within the words of the statute declaring it is applicable only, in strict terms, to cases where the offense is created by statute, or where the punishment has been increased, and the pleader seeks to bring the prisoner within the enhanced punishment. It is a clear proposition that an approved form of indictment at common law is good for the same offense, though declared by legislative enactment." The case was taken by writ of error to the court of errors, and the judgment of the supreme court affirmed by the unanimous opinion of the court: *People v. Enoch*, 13 Wend. 159 [27 Am. Dec. 197]. Other authorities might be cited, but these will suffice to place it beyond question that the decision of this court in Gehrke's case, and White's, settled the law rightly upon principle and authority.

There is and can be no question of the sufficiency of the evidence to warrant the finding of the jury; nor is there any question of the correctness of the charge of the court. There is manifestly no error in the judgment.

But it is now insisted that this court cannot affirm the judgment, by reason of the repeal of the law defining the degrees of murder, and the abolition of the common law, effected by the penal code, arts. 609, 612, 612 a, which went into force on the first of the present month, since this appeal was pending. The general principle is admitted, that if the law which created the offense is repealed, after the repealing act takes effect no further proceeding can be taken under the repealed law to enforce the punishment. The general principle which has been invoked, qualified by the condition that the repealing statute substitutes no other penalty, and does not otherwise provide, is enacted in the code, art. 15. The principle is held to apply as well to the proceeding upon appeal, in the appellate court, as to the court having original cognizance of the offense; and as well where the repeal took effect after the removal of cause to the appellate court as before: *United States v. The Schooner Peggy*, 1 Cranch, 103. But admitting the general principle in all its force, its application to the present case is expressly provided against and prevented by the repealing act. The fourteenth article of the code, to which we are referred, at the same time that it declares that when the penalty for an offense prescribed by one law is altered by a subsequent law the penalty of the latter shall not be inflicted for a breach of the former, also declares that "in every such case the offender shall be tried under the law in force when the offense was committed, and if convicted, pun-

ished under that law; except that when by the provision of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed." Again: article 18 declares "that no offense committed prior to the taking effect of this code shall be affected by the repeal therein of existing laws; but punishment shall take place as if the laws repealed had remained in force; except that when the punishment shall have been mitigated by the code, its provisions shall apply to and control any judgment to be pronounced after its taking effect, for any offense theretofore committed; unless the defendant elect the former punishment."

The only question, then, for the court to inquire of, is, whether the punishment for the offense of murder has been ameliorated or mitigated by the provisions of the code. And it is clear that it has not. The punishment is, as heretofore, by death, or confinement in the penitentiary, "according to the degree of atrocity or the circumstances of extenuation in each particular case." It may be death, or solitary confinement in the penitentiary for life, or confinement in the penitentiary to labor for a term of years, not less than three nor more than fifteen: Pen. Code, art. 612 a. It could not be more or less under the former law. It cannot, therefore, be said that the punishment has been ameliorated by the code. The only alteration in the punishment effected by the code is that it prescribes as an intermediate punishment between death and confinement in the penitentiary for the longest period under the former law—i. e., fifteen years (Hart. Dig., art. 2517)—solitary confinement for life. But that is not substituted in the place of either death or confinement in the penitentiary for a term of years. It is provided to give the jury more ample scope to apportion the punishment according to the nature and heinousness of the offense; by a just estimate of which, it is made their duty to regulate the punishment from that of death to confinement in the penitentiary to labor for a term of not less than three years: Pen. Code, arts. 609, 612. Whether the punishment shall be death or the milder punishment is still made to depend on the "degree of atrocity or the circumstances of extenuation in each particular case," preserving the same extremes as the former law. There is, therefore, no abatement or mitigation of the punishment; the object of the former law in defining the degree of murder was the same as the present, that is, as the code de-

clares, to "regulate the punishment according to a just estimate of the heinousness of the offense." By that law, the jury found the degree by their verdict, and the law annexed the penalty; by the present law, the jury are not to find the degree expressly, but only as their verdict shall manifest their estimate of the heinousness of the offense by the punishment imposed. What the law required the court to pronounce upon the finding of the jury, the jury are now to declare by their verdict. But in either case, the jury must decide upon the degree of guilt, the punishment to be regulated according to their estimate of it. They formerly found the degree; they are now to find the punishment; and it is but a different mode of arriving at the same result. The code, therefore, can in no sense be said to ameliorate or mitigate the punishment. That implies that the penalty is reduced, or in fact taken away, a diminution of the punishment which the provisions of the code do not propose or effect.

Finally, the code of criminal procedure, tit. 5, sec. 2, declares that "no action, plea, prosecution, or proceeding in any criminal case now pending, or which may be pending when this act takes effect, shall be affected by the repeal of the laws under which it originated, but the same shall proceed in all respects as if no such repeal had taken place; except that all proceedings had after the time this act takes effect shall be conducted according to its provisions."

There is nothing in the provisions of the code to prevent the court from proceeding to judgment, in cases similarly situated to the present, as though it had not been passed; and it manifestly was not the intention or within the contemplation of the legislature that anything therein contained should have that effect, or relieve the court from the duty of affirming a judgment of conviction which had been rightly rendered according to law. We are of opinion, therefore, that the judgment be affirmed.

Judgment affirmed.

PARTY MOVING CONTINUANCE of criminal cause on the ground of his inability to subpoena a witness, by reason of the recent finding of the bill and his close confinement since his arrest, must show that he has certain witnesses, giving their names, and must state what he expects to prove by them in order that the court may determine whether or not the testimony would be material: *Roberts v. State*, 58 Am. Dec. 528.

INDICTMENT CHARGING STATUTORY CRIME not in the words of the statute, but in equivalent words, is good: *Ben v. State*, 58 Am. Dec. 234; and for an instance of a common-law indictment held proper under a statute, see *People v. Enoch*, 27 Id. 197.

THE PRINCIPAL CASE IS CITED in *Martin v. State*, 1 Tex. App. 524; *Chapin v. State*, 7 Id. 88, and *Walker v. State*, Id. 257, to the point that where a statute defining a crime and prescribing its punishment is repealed, pending a prosecution for that offense, or pending an appeal for a conviction thereof, no punishment can be inflicted for the commission of the crime, although done at a time when the repealed law was in effect; in *Jackson v. State*, 4 Id. 295, to the point that an application for a continuance of a criminal case will be refused when grounded on the want of an absent witness, and it is shown that diligence has not been employed to secure the attendance of the witness as required by the statute; in *Jennings v. State*, 7 Id. 354-356, to the point that the statute did not change the common-law definition of murder, therefore an indictment in the common-law form contained every substantial requisite; in *Dinkins v. State*, 42 Tex. 253, it is distinguished on the last point mentioned *supra*.

GRASSMEYER v. BEESON.

[18 TEXAS, 753.]

COURT HAVING JURISDICTION TO RENDER DECREE, it is conclusive as to the questions adjudicated therein, and cannot be reopened to examination or discussion unless obtained by fraud.

WHETHER DECREE IS OBTAINED BY FRAUD or not, a party in interest may acquiesce in and abide by it, and after a space of fifteen years a stranger, not a party or privy, nor claiming under a party in interest, cannot impeach it, especially when there is no evidence of fraud requiring the court to leave that question to the jury.

PROOF MUST BE PRODUCED TO WARRANT COURT IN SETTING ASIDE JUDGMENTS, and annulling titles to land on the ground of fraud. It must not be done upon mere surmise or suspicion, nor upon evidence which does not necessarily, naturally, and reasonably tend to that conclusion.

TEXAS COURT OF EQUITY HAS POWER AND JURISDICTION TO DECREE SPECIFIC PERFORMANCE and partition, and such decree vests the title to the land conveyed in the party named therein. The statute has deprived the court of none of its powers in this particular.

DECREE OF PARTITION CANNOT BE COLLATERALLY IMPEACHED by a stranger.

ALTHOUGH PARTITION MADE UNDER DECREE by commissioners appointed for that purpose is invalid, still the decree without partition vests in the party named therein the exclusive title in the land set apart and conveyed to him by it, and constitutes him a tenant in common with the original grantee, and as such he has sufficient title to enable him to maintain an action of trespass to try title against a stranger.

REMOVAL OF GRANTEE FROM TEXAS to one of the states of the Mexican confederacy is not an abandonment of the former, within the inhibition of the thirtieth article of the colonization law of March 24, 1825.

TRESPASS to try title to half a league of land. The land in controversy was granted to one Kennelly, who afterwards gave Grassmeyer a bond to make him a title to one half of the land as soon as the laws of the country would permit. Seven years

afterward plaintiff instituted suit on his bond for title and partition, alleging in his petition that Kennelly was "absent in parts unknown," and praying that service be had on one Scranton, as curator of the estate of Kennelly. Scranton answered, alleging ignorance of the matters contained in the petition, and demanded proof. Publication was ordered, and was made for the period of six weeks, requiring Kennelly to appear at the next term of court; when the trial came on, Kennelly not appearing, one Lewis was appointed as his attorney *ad litem*; and after proof of the allegations in plaintiff's petition, he had judgment for title and partition. Commissioners were appointed to make such partition, which they did, and their report was confirmed by the court; whereupon Scranton made title to the upper half of the league to Grassmeyer. These proceedings took place in 1840 and 1841; in 1854 this suit was instituted and tried; at which trial the court instructed the jury that the proceedings *supra* were null and void, and Beeson had judgment. This judgment was, however, on appeal reversed, and the cause remanded. At the second trial of this case, Beeson filed an amended answer, in which he alleged that the land had become vacant by its abandonment by Kennelly; further alleging title in himself for the land in question by virtue of a valid land certificate; also that the decree for title and partition in the proceedings first above mentioned was fraudulent and void, stating specifications of fraud at length. The plaintiff asked the following instructions, which the court refused: 1. That the proceedings first above mentioned were valid, and vested the title to the land in Grassmeyer; 2. That the decree in that case cannot be questioned by any one but Kennelly, or those who claim under him; 3. That the length of time elapsing since those proceedings were had is evidence of acquiescence on the part of Kennelly and plaintiff to the decree rendered therein, and that such acquiescence would validate any irregularity which is apparent therein; 4. That though there was an irregularity in the partition of the land, still the deed from Scranton to Grassmeyer vested the title in him; and was sufficient to make the partition valid. There was verdict and judgment for the defendant. Motion for a new trial overruled, and plaintiff appeals.

W. G. Webb and G. W. Smith, for the appellant.

J. H. Robson, for the appellee.

By Court, *WHEELER, J.* The questions now presented, which were not determined upon the former appeal (13 Tex. 524), and

which are deemed to require notice, arise upon the obligations of fraud, and the effect of the decree for specific performance and partition.

Having heretofore determined that the court had jurisdiction to render the decree, it is perfectly clear that it is conclusive of the questions adjudicated therein, and that they are not now open to examination or discussion, unless the decree was obtained by fraud: *Shannon v. Taylor*, 16 Tex. 413. However obtained, it will not be questioned that it was competent for the party whose interest was affected by it to acquiesce in and abide by the decree if he saw proper. If he is content, as it seems he has been for the space of fifteen years—and the evidence leaves little room to doubt that he must have been aware of it—it would seem that a stranger, one who was not a party or privy, and who does not claim under the party, or pretend to have any right or interest to be affected by the judgment, cannot impeach it. But if he can, there was no evidence of fraud, which required the court to leave any such question to the jury. If the plaintiff's attorney did draw up the answer of the curator for him, that, in an action of this nature, which was only intended to perfect an equitable into a legal title and have partition, which the curator had no reason to suppose the absentee would have opposed if present, was no evidence of fraud. The curator was under no obligation or necessity to employ counsel and litigate the case, or to make opposition further than to require the plaintiff to establish his right by proof. The answer he adopted had that effect, and that was sufficient, especially as the absentee was also represented by an attorney of the court. There is no pretense that the latter colluded with the plaintiff to defraud the absentee, or that he was wanting in fidelity to the party he represented. There is as little ground to impute a fraudulent design to the curator. When it is considered that Kennelly has since been in the country, and there is reason to believe he must have known of this judgment, and he has not complained of it, it cannot be deemed that the evidence affords ground for even a suspicion that it was obtained in fraud of his rights. If after so great a lapse of time, and under circumstances like these, the judgments of the court and the titles and rights depending upon them were liable to be set aside and annulled upon such evidence as this, there would be no security for titles or property. Instead of being protected by the certain and fixed principles of the law, they would be liable at all times to be defeated by the prejudice, whim, or caprice of a jury, on some such fanciful and imper-

ceptible ground as a suspicion of latent fraud, which was not susceptible of proof. There must be some proof to warrant the setting aside of judgments and the annulling of titles on the ground of fraud. It must not be on mere surmise or suspicion, nor upon evidence which does not necessarily, or naturally and reasonably, tend to that conclusion: 1 Story's Eq. Jur., sec. 198; 1 Hovenden on Frauds, 24.

In respect to the effect of the decree, and the partition of the land in pursuance thereof, it unquestionably was valid and effectual to vest in the plaintiff the title to the part conveyed to him under and in obedience to the decree. The court acted in the matter of decreeing a specific performance and partition in virtue of its powers and jurisdiction as a court of equity, and not by virtue of an authority conferred merely by the statute. As a court of equity, it possessed full power and authority to decree partition, and provide for carrying its decree into effect, by appointing commissioners and directing a conveyance: 1 Story's Eq. Jur., c. 14, secs. 656 et seq. The statute, Hart. Dig., arts. 2617 et seq., was doubtless borrowed from the legislation of states where, by reason of the inadequacy of the remedy afforded by the common-law writ of partition (for until the statute of 31 Hen. VIII., c. 1, and 32 Hen. VIII., c. 32, no writ of partition lay at law for a joint tenant or tenant in common), legislation was necessary to enable parties to obtain partition in a court of law. But the giving of the remedy by statute in a court of law has never been deemed to take away or in any degree to abridge the original and inherent powers and jurisdiction of the court of chancery in respect to the partitioning of estates. The statute prescribes a procedure which parties may adopt if they see proper, but it is not obligatory. Our courts, possessing the powers of courts of chancery, may proceed to administer relief, upon the principles of equity, as fully and completely as a court of chancery in England could do, without the aid of the statute. The foundation of the jurisdiction of equity is not in the statute, but in the judicial incompetency of the courts of common law to furnish a plain, complete, and adequate remedy; and in complicated cases the statute would afford a very inadequate and incomplete remedy. It is usual to provide in the decree for the commissioners to report, and upon confirmation of their report, to direct conveyances to be made; but it is competent for the court to direct the manner of making the partition, and to decree the making of the conveyances, without the necessity of a report and decree of confirmation. The court may,

in the first instance, direct conveyances to be made in pursuance of the allotments of the commissioners, if that be deemed proper. There can be no doubt that the powers of the court are adequate for this purpose; and if the decree should be erroneous, none but a party or privy, or some one whose interest is in some way affected by it, could complain, or take advantage of the error. The decree cannot be collaterally impeached by a stranger. The decree and partition vested in the plaintiff the exclusive right and title in the land set apart and conveyed to him under and in pursuance of the decree, upon which he was entitled to maintain his action.

But if the partition had been invalid, still the decree, without partition, vested in the plaintiff an undivided interest in the land, and constituted him a tenant in common with the original grantee; and that was a sufficient title to enable him to maintain his action against this defendant. We have heretofore decided that one tenant in common may maintain trespass to try title against a stranger: *Croft v. Rains*, 10 Tex. 520.

It is scarcely necessary to say that the removal of the grantee from this to another of the states of the Mexican confederacy in 1833 was not an abandonment of the country, within the inhibition of the thirtieth article of the colonization law of the twenty-fourth of March, 1825.

The plaintiff's was a good and valid title to the land for which he sued; and there was nothing in the matters of defense urged against it to defeat his right to a recovery.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

JUDGMENT OF COURT HAVING JURISDICTION of the subject-matter of the suit and of the person is not impeachable collaterally, unless it may be for fraud: *Horner v. State Bank of Indiana*, 48 Am. Dec. 355. That a judgment obtained by fraud will be vacated, see *Dial v. Farrow*, 36 Id. 267; but that it cannot be impeached collaterally on that ground, see *Horner v. Fish*, 11 Id. 218.

OPENING JUDGMENT AS FRAUDULENT: Note to *Whiting v. Johnson*, 14 Am. Dec. 633.

DECREE CANNOT BE IMPEACHED FOR FRAUD after twenty-five years' acquiescence by party: *Pendleton v. Galloway*, 34 Am. Dec. 434; but the rule that a judgment cannot be inquired into or reversed in a collateral proceeding, except for fraud, admits of an exception in favor of parties not privies to it who would otherwise be without remedy: *Caldwell v. Walters*, 58 Id. 502.

FRAUD MUST BE ESTABLISHED by proof; it will not be presumed: *Hempstead v. Johnson*, 65 Am. Dec. 458, note 473.

JURISDICTION OF EQUITY IN PARTITION IS UNDOUBTED: *Howey v. Goings*, 54 Am. Dec. 427; *Rutherford v. Jones*, 60 Id. 655.

JUDGMENT IN PARTITION IS CONCLUSIVE: Note to *Nicely v. Boyles*, 40 Am. Dec. 640; *Herr v. Herr*, 47 Id. 416.

DECREE OF COURT HAVING JURISDICTION is binding on the parties to it, and concludes all inquiry into the legality of the original contract on which it was rendered: *Mills v. Alexander*, 21 Tex. 162, citing the principal case, which is again cited in *Hatch v. Garza*, 22 Id. 188, to the point that the question of fraud in a contract of bargain and sale is as completely concluded by judgment as if it had been set up as a defense to the suit, and cannot be made the ground of avoiding or impeaching the validity of the judgment or of a claim for equitable relief in a collateral action.

THE PRINCIPAL CASE IS CITED in *Moke & Bro. v. Brackett*, 28 Tex. 446, to the point that a judgment in favor of or against a *feme covert* suing as a *feme sole*, or in favor of or against a dead man, is manifestly erroneous, as soon as the fact appears; but such judgment is voidable only, and not void, when the fact does not appear by the record. See also *Milam Co. v. Robertson*, 47 Id. 233; *Taylor v. Snow*, Id. 464. Such judgment may be set aside by writ of error *coram nobis*: *Giddings v. Steele*, 28 Id. 755, all citing the principal case.

JUDGMENTS WILL NOT BE SET ASIDE ON MERE SURMISE or suspicion of fraud; it must be established by evidence that naturally and reasonably tends to that conclusion: *Giddings v. Steele*, 28 Tex. 758, citing the principal case.

TENANT IN COMMON MAY RECOVER a specific portion of a tract of land from a trespasser, for the seisin of such tenant extends to the whole tract, and an equitable title will sustain the action: *Hooper v. Hall*, 30 Tex. 158; and such tenant or a joint tenant may maintain either trespass or ejectment in his own name against a trespasser or wrong-doer: *Presley v. Holmes*, 33 Id. 478; *Alexander v. Gilliam*, 39 Id. 236; and he may recover the whole tract: *Cromwell v. Holliday*, 34 Id. 469; *Sowers v. Peterson*, 59 Id. 221; so a *feme sole* owning an undivided interest in the land may allege such title and maintain her action against the wrong-doer: *Hutchins v. Bacon*, 46 Id. 414; and in the case of a tenant in common, this was held to be the rule, although his petition failed to show that he was only a part owner: *Stovall v. Carmichael*, 52 Id. 389. All the above cases cite the principal case.

ALEXANDER v. MILLER'S EXECUTORS.

[18 TEXAS, 893.]

ALTERATION IN LEVY MADE BEFORE ADVERTISEMENT or notice, or before anything is done under the levy as first made, will not invalidate it; nor is it an objection to the levy as finally made that it was made at the instance of the attorney of the plaintiff in the execution.

RATIFICATION OF LEVY AS FINALLY MADE is a waiver of any valid objection to the manner in which it has been made.

NOTICE OF JUDICIAL SALE is notice of preceding proceedings therein.

MISDESCRIPTION IN DATE OF ENTRY OF JUDGMENT shown to have been a mere clerical error is not material, when the execution describes the judgment in every other particular except the date of its rendition, thus sufficiently identifying it as the judgment upon which the execution issued.

DESCRIPTION IN LEVY, THAT "BY VIRTUE OF the within execution, I have levied on fourteen labors of the Gilleland league of land, or so much of said tract as will satisfy the within execution, commencing at the north-west corner," and that the "tract to be offered [for sale] to commence at the north-east corner thereof," is sufficient to identify the land.

DESCRIPTION OF LAND IN DEED AS BEING "a certain tract or parcel of land lying and situate in the county of Colorado, being a part of the Gilleland league, and consisting of fourteen labors, which said tract, seised as above, commences at the north-east corner thereof," followed by description by boundaries, is sufficient to identify the land.

ACTION to set aside a sheriff's sale and deed. Both parties claim title to the land in dispute from one Lewis, who at the time of the levy was the owner of said tract. Defendant claims by virtue of a judgment, execution, and sheriff's deed. It was in evidence that one Walker was attorney and agent for the defendant, who not being present at the sheriff's sale, said Walker bid off the land for him; that after the first levy was made, Walker, being upon the land of Lewis, saw some rich prairie land which was not included in the first levy; wishing it included, he afterwards changed the levy for that purpose, the first levy commencing at the north-west corner of a certain tract, the second naming the north-east corner of the same tract as the place of commencement; this second levy was made by Walker shortly after the first, and signed by a deputy sheriff. On the day on which the land was to be sold, Walker being importuned by Lewis for a postponement of the sale, he consented. Lewis at once wrote a letter, the purport of which was that in consideration of the postponement granted, he, Lewis, waived all legal objection to the levy, and that the land might be sold without appraisement or advertisement if the judgment creditor's claim was not paid before the time agreed upon for the sale. Walker then testified that the execution on which the levy was made was not present at any conference which he had with Lewis; that he did not know of Lewis's having seen it; that the second entry or levy was made on the execution before Lewis wrote the letter; that the land was sold at the time agreed upon, and that he purchased it for Miller as his agent; that the sheriff sold enough land to satisfy the execution, said land beginning at the point named in the last levy; and that when the amount of land so sold was ascertained, the deed was made under which Miller claims. It was objected, on the part of the plaintiff, that the execution purported to have been issued on a judgment rendered on the ninth of September, whereas the judgment introduced in

evidence was rendered on the sixth of that month. Other facts are in the opinion.

J. W. Harris, for the appellants.

G. W. Smith, and J. B. and G. A. Jones, for the appellees.

By Court, WHEELER, J. If the alteration in the levy was made, as there is no reason to doubt that it was, before advertisement or notice, or anything done under the levy as first made, it can have worked no injury to the defendant in execution; and it is not perceived that there is anything in the mere fact of such alteration that should invalidate the levy. Nor is it perceived that it is any objection to the levy as finally made that it was at the instance of the attorney of the plaintiff in execution: *Bryan v. Bridge*, 6 Tex. 137; *Sydnor v. Roberts*, 13 Id. 598, 622 [65 Am. Dec. 84]. But if there was any valid objection to the levy, it was expressly waived by the defendant in execution before the sale. It is evident from his letter of the sixth of June that he was fully apprised of the levy and advertisement, and he thereby expressly ratified the levy "as made;" waived all legal exceptions to the proceedings under the execution, and authorized the sale of the land "so levied upon," etc. The alteration in the levy had been previously made, and the defendant in execution doubtless knew how the levy then stood. It was his business to know, when he undertook to ratify the levy as made; there was nothing to prevent his knowing, and it would be unreasonable to suppose he did not know; doubtless he did know the precise state of the case. Clearly, his ratification of the levy was a waiver of the objection, if any valid objection to the manner in which the levy had been made did, in fact, exist.

It is objected that the defendants, when they purchased, had no notice of this letter. They however had notice of the levy and sale. This point was fully determined when the case was first before us: *Miller v. Alexander*, 8 Tex. 36. Notice of the sale was notice of the proceedings therein. The defendants had notice of the levy, and we have heretofore decided that was *prima facie* legal and valid: *Miller v. Alexander*, 13 Id. 497 [65 Am. Dec. 73]. There is therefore nothing in the objection of want of notice.

The misdescription in the date of the entry of judgment is conclusively shown to have been a mere clerical mistake. It must have been such, because there was no such judgment rendered on the ninth, but it was on the sixth of September the judgment was rendered. The ninth was the day of the adjourn-

ment of the court, and that accounts for the mistake. The execution describes the judgment which was rendered on the sixth accurately in every particular, except the date of its rendition; and that was not material, as the judgment was otherwise sufficiently identified. There could be no mistaking the judgment on which the execution issued.

The only remaining objection to the judgment which is deemed to require notice is that now first taken in this court, having reference to the identity of the land which was levied on and sold. It is objected that the levy and sale were of land off of the north-east corner of the Gilleland league, and not off of the tract or parcel of the league previously conveyed by Gilleland to Lewis, the defendant in execution.

This objection was not taken in the court below. There was no question then made as to the identity of the land actually sold and conveyed by the sheriff's deed. It has evidently always been well understood by all concerned that it was the north-east corner of the tract conveyed to Lewis, out of the league, and not the north-east corner of the league that was levied on and sold. The objection now taken rests on the description in the levy and deed; particularly the latter. On an attentive consideration of the terms of the levy and deed, we are of opinion that the objection is barely plausible, not sound. The levy is in these words: "By virtue of the within execution, I have levied on fourteen labors of the Gilleland league of land, or so much of said tract as will satisfy the within execution, commencing at the north-west corner." The subsequent entry is: "Tract to be offered to commence at the north-east corner thereof." The "tract" evidently has reference to the "fourteen labors off of" the league; and the "north-east corner thereof" as evidently has reference to this tract, and not, as is supposed, to the north-east corner of the Gilleland league. This seems plainly enough to be the meaning of the terms in which the levy is expressed. The language of the deed is as little susceptible of the construction contended for. It is as follows: "I have seized and taken, of the lands and tenements of the said Ira R. Lewis, a certain tract or parcel of land, lying and situate in the county of Colorado, being a part of the Gilleland league, and consisting of fourteen labors, which said tract, seized as above, commences at the north-east corner thereof," proceeding to describe the boundaries of the six hundred and eighty-two acres sold off the tract of fourteen labors to satisfy the execution. It is perfectly plain that the land "seized and taken" as

the property of the defendant in execution is the "tract or parcel" of land which was "a part of the Gilleland league," and that the "tract or parcel" is that which is described as "consisting of fourteen labors;" and that when it is added, "which said tract, seized as above, commences at the north-east corner thereof," it means the north-east corner of the "said tract" of fourteen labors, as plainly as if it had been so expressed. The apparent ambiguity arises from the reference to the league, by way of description, of which this tract is a part. When duly considered, there is no real ambiguity or difficulty as to the identity of the land levied on and sold. It is very evident from the pleadings and evidence in the case that none of the parties concerned have been misled by any want of certainty in the levy and deed; they have never given the construction to the levy now contended for. The reference upon a former appeal to the corner of the league was an inadvertence. This question was not then made or considered. The description of the land is not as certain and clear as it might have been, but it is sufficiently so to leave no room for doubt or mistake as to the land really intended. Upon the whole, we are of opinion that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

IRREGULARITIES IN LEVY, advertisement, etc., may be waived by defendant in execution before sale: *Miller v. Alexander*, 65 Am. Dec. 73.

VARIANCE OF EXECUTION FROM JUDGMENT does not make the execution an absolute nullity: *McCullum v. Hubbert*, 43 Am. Dec. 56; the execution must pursue and be warranted by the judgment, but misstating the date of the judgment in the execution, if it describes and identifies it so as to render sure the authority upon which it issued, is sufficient to invest the sheriff with authority to sell, and in a collateral proceeding will sustain the sale: *Sprott v. Reid*, 56 Id. 549, and notes to these cases.

INSTANCES OF WHERE DESCRIPTION IN LEVY HAS BEEN HELD SUFFICIENT: *Gilman v. Thompson*, 34 Am. Dec. 714; *Parker v. Swan*, Id. 619; *Brigance v. Erwin's Lessee*, 57 Id. 779, and notes to these cases; *contra*, see Id., and *Taylor's Lessee v. Cozart*, 40 Id. 655, note 656.

DESCRIPTION IN DEED SUFFICIENT TO PASS TITLE: See *Melvin v. Proprietors*, 38 Am. Dec. 384; *Gourdin v. Davis*, 45 Id. 745; *Dow v. Jewell*, Id. 371, and notes to these cases.

WHERE IT IS PROVED THAT LEVY WAS MADE ON LAND POINTED OUT by the judgment debtor, that he was present at the sale thereof and assented to it, that the purchaser went into and remained in possession, these facts are sufficient to show a waiver of any irregularities in the levy and sale: *Wilson v. Smith*, 50 Tex. 370, citing the principal case, which is cited in *Haskins v. Wal-let*, 63 Id. 219, to the point that a sheriff's deed is not void, acquired under an execution sale, when it is proved that the judgment recited in the execution is the same as the one rendered against the party in the suit.

PETERS v. PHILLIPS.

[19 TEXAS, 70.]

COUNTY COURT'S JURISDICTION TO ENFORCE SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACT TO CONVEY LAND in a suit against his administrator, under the Texas statute, is special, and exists only where there is a bond or a contract in writing, disclosing all the terms of the agreement, in analogy to the memorandum required by the statute of frauds. **DECEDENT'S BOND TO CONVEY RECITING CONTRACT FOR CONVEYANCE** in all its terms is sufficient to confer jurisdiction upon the county court, under the statute, for the specific enforcement of the contract, although the contract is not produced.

APPEAL from a judgment of the district court reversing the judgment of the county court in favor of the plaintiffs, upon a petition for the specific performance of a deed or bond in writing, made by one Byers, deceased, to convey certain land to the petitioner and one John S. Peters, since deceased. The bond was produced in evidence in the county court, and was for the penal sum of four hundred dollars. The condition recited the previous making of a contract between the purchasers and the decedent, whereby the former undertook to locate and clear out of the land-office certain land to which the decedent was entitled under his headright, to pay all expenses, to pay the decedent the sum of two hundred dollars and give their notes for the balance, in consideration of which it was recited that the decedent was bound to convey to the purchasers a certain part of the land to be taken off of some line of said tract or tracts as it may be located. The condition proceeded: "Now, if, upon running the boundary line between the United States and Texas, it should so turn out that said Byers did not reside within the limits of Texas at the declaration of independence, and therefore not be entitled to said league and labor of land as a citizen of Texas, then and in that case the said John C. Byers shall well and truly refund and pay back to the said Peters the said sum of two hundred dollars with lawful interest thereon, or return the note given for the same, then the above obligation to be void, else to remain in full force and effect." The other facts sufficiently appear from the opinion.

S. F. Moseley and J. J. Peters, for the appellant.

J. T. Mills, for the appellees.

By Court, **HEMPHILL, C. J.** The main question in this cause is, whether the instrument offered in evidence and designated in the margin as a title bond is such a bond or written agreement

to make title to property as would, under article 1162, give jurisdiction to the county court.

The jurisdiction of that court over the subject-matter is special, and can be exercised only where there is a bond, or the agreement to make title is in writing. Now, literally, this instrument is not a bond to make title; but it recites fully the terms and conditions of a contract to that effect, and by which Byers, the intestate whose representatives are charged as defendants in this suit, undertakes and binds himself, on the performance of certain conditions by the Peterses, to convey to them one thousand two hundred and eighty acres of his headright league of land. By a close construction, it might be held that this instrument was not of a character to give jurisdiction under the article cited; but although it would seem that the object of giving the county court authority was to provide a cheap and expeditious mode of enforcing plain agreements, about which there was little or no dispute; and although the resort to such jurisdiction, where the case like the present is severely contested, is deemed very injudicious, yet it would seem that the same rules to ascertain what may be included within the scope of the terms "bond" or "written agreement" should be applied to the construction of the article that are recognized with reference to the promise or agreement or memorandum of a contract being in writing under the act to prevent frauds and perjuries. This act in its first section, article 1451, declares that no action shall be brought to charge a person upon a contract for the sale of lands, unless the promise or agreement, or some memorandum thereof, shall be in writing, and signed by the party intended to be charged, or by his agent lawfully authorized. Now, it has always been held, under statutes of similar import in England and in the other states, that the written evidence required by the statute need not be comprised in a single document, or drawn up in any particular form. It is sufficient if the contract can be plainly made out in all its terms from any writings of the party or from his correspondence; that the place of signature is not material; that the signature of a party as a witness to a deed which contained a recital of the agreement was held sufficient where it appeared that he knew of the recital: *Welford v. Beezely*, 1 Ves. sen. 6; 1 Greenl. Ev., sec. 298. That the receipt for the purchase money may constitute an agreement within the statute: 1 Sugd. Vend. 115. A receipt stating that the vendor had received of the vendee a certain sum, being on account of a plantation on the Cypress, sold to him this day for two thousand two

hundred dollars, payable in different installments, as per agreement, was held sufficient compliance with the statute of frauds: *Cosack v. Descoudres*, 1 McCord, 425 [10 Am. Dec. 681]. The receipt for the purchase money, in part or in the whole, has in all cases been held sufficient where it specifies the terms of the contract, names of the parties, amount of the purchase money, etc.; and the reason is, that there is so much of the contract in writing that it can be enforced without the aid of parol testimony: *Brickman v. Brickman*, 6 Blackf. 21; *Pitt's Trustees v. Viley*, 4 Bibb, 466; *Kay v. Curd*, 6 B. Mon. 100.

The instrument in this case shows clearly, and it appears fully by way of recital, all the terms of the contract by which, on the one hand, the Peterses undertook to locate and clear out of the land-office the headright certificate of Byers; and he, on the other hand, bound himself to convey to said Peters twelve hundred and eighty acres, in two sections of the said tract or tracts of land, as the same might be located. The names of the parties, the terms of the agreement, the conditions and covenants, are fully stated; and there is no necessity of resort to parol testimony to ascertain any of the essentials, or, it would seem, any of the particulars of the contracts. Byers states that he is bound by the contract to convey the land. This concludes him and his representatives. The instrument showed sufficient evidence of the contract in writing to have authorized a decree for specific execution had suit been brought in the district court; and we are of opinion that although there is some difference between the terms employed in article 1162 and those used in the statute of frauds, yet that any such written evidence of a contract to sell property as would authorize its specific execution in the district court under the statute of frauds will be sufficient to authorize the county court to decree its execution. The policy of both of the provisions is, that there should be written evidence of the contract, and that it should not be supported by parol; and where the former is offered, the object is accomplished; and the law in either case must be held as satisfied. Upon the whole, we are of opinion that the contract was legitimately within the cognizance of the county court, and that the suit cannot be abated for want of jurisdiction. This point was not raised by the parties; but being one of jurisdiction, its consideration and decision could not be avoided.

This instrument, or bond, and the patents—the land being located in two tracts—were filed several months after the proceedings were commenced in the county court. By whom they

were filed does not appear. The county court in its judgment recites that there was satisfactory written evidence of the contract, and decreed for the plaintiffs; on appeal to the district court the judgment was reversed, but on what grounds does not distinctly appear. From the affidavit on the motion for a new trial, it might be presumed that in the opinion of the court the evidence was insufficient in this, that the contract to which there was reference was not produced. If so, there was error, as the evidence in this particular was, as we have shown, sufficient proof of the terms of the agreement.

But it does not appear that any evidence was offered by the plaintiffs of the performance of the conditions, locating the land, etc. The record does not show from whose possession the patents came. The presumption from the argument of counsel is that they were filed by Peters; and there may have been a further presumption below that as he had the patents in possession, he must have paid the charges and expenses.

But there being no evidence in relation to these facts, we do not feel authorized to enter the judgments which should have been pronounced below, and the judgment is therefore reversed and cause remanded for a new trial.

Reversed and remanded. —

SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACTS: See *Chess's Appeal*, 45 Am. Dec. 668; *Moore v. Fitz Randolph*, 29 Id. 208; *Green v. Broyles*, 39 Id. 156; *Robbins v. McKnight*, 45 Id. 406; *Johnson v. Hubbell*, 66 Id. 773, and notes. In *Bullim v. Campbell*, 27 Tex. 655, the principal case is cited to the point that a contract of a decedent to convey land is not such a claim as requires presentation to the administrator. In *Guilford v. Love*, 49 Id. 745, the case is cited to the point that the jurisdiction of the county court for the specific enforcement of such a contract is special, and can be exercised only where there is a bond or written contract. It is again cited at pages 746 and 747 of the same case, and explained. And at page 733 it is cited to the point that the heirs of the decedent need not be joined in a suit against his administrator to enforce his bond to convey.

MEMORANDUM OF CONTRACT UNDER STATUTE OF FRAUDS, SUFFICIENCY OF: See *Old Colony R. R. Corp. v. Evans*, 66 Am. Dec. 394; *Ives v. Hazard*, 67 Id. 500, and notes. To the point that such a memorandum must be so certain that specific performance can be enforced, the principal case is cited in *Johnson v. Granger*, 51 Tex. 45.

STATE v. WASHINGTON.

[19 TEXAS, 128.]

INDICTMENT FOR AFFRAY NOT ALLEGING FIGHTING in express terms, but charging that the defendants, with force and arms, at a certain time and place, were unlawfully assembled together, and being so unlawfully assembled and arrayed in a warlike manner, then and there did make an affray, to the great terror of divers goods citizens, etc., is sufficient.

APPEAL from a judgment quashing an indictment for an affray. The substance of the indictment is sufficiently stated in the *sylabus*. Upon a motion to quash, on the ground that there was no allegation of any fighting, the district attorney amended the indictment by inserting an explicit allegation upon that point. The defendants excepted to the amendment as matter of substance. The court sustained the exceptions and quashed the indictment, whereupon this appeal was brought.

James Willie, attorney-general, for the appellant.

By Court, **WHEELER, J.** The indictment is in accordance with precedent, English and American: Wharton's Precedents of Indictments, 489. It was so adjudged and approved by the unanimous opinion of the supreme court of the republic, pronounced by Judge Ochiltree, in the case of *Saddler v. Republic*, Dallam, 610. There was no occasion for the proposed amendment. The indictment was unquestionably good and sufficient.

Judgment reversed and cause remanded.

Reversed and remanded. —

AFFRAY, WHAT CONSTITUTES: See *Hawkins v. State*, 58 Am. Dec. 517.

PRICE v. WILEY.

[19 TEXAS, 142.]

AMENDMENT TO PETITION SUBSTITUTING PRINCIPALS AS PLAINTIFFS, in an action brought by their agent, affords the defendant no ground of objection, unless he was thereby deprived of some substantial right.

SUBSTITUTION OF PRINCIPALS IN ACTION BY AGENT IS NOT MAKING NEW PARTY, where it is done with the consent of the agent, and upon his allegation that he has no interest in the note sued on, but is merely the agent of the new plaintiffs.

PRINCIPALS CANNOT BE SUBSTITUTED AS PLAINTIFFS IN ACTION BY AGENT AFTER AGENT'S DEATH, where the fact that he sues for their use does not appear from the petition, but the suit must be revived in the name of his representatives, and the principals claiming to be the real parties in interest may contest their rights with the representatives and claim judgment in their names, if the defendant is not thereby deprived of any substantial defense.

ERROR to reverse a judgment obtained against the plaintiff in error as defendant in an action on a note. The case is stated in the opinion.

J. H. Parsons, for the plaintiff in error.

Lewis and Flanagan, for the defendants in error.

By Court, **HEMPHILL**, C. J. This suit was brought by Charles Keith as plaintiff, against Joseph H. Price, the plaintiff in error, as defendant.

Subsequently, and after a plea of general denial by defendant, there was put in a pleading which is styled an amended petition, in which the plaintiff, by leave of the court, comes and amends, and says that Charles Keith (that is, the plaintiff himself) is but the nominal plaintiff in the case, and never had any interest, ownership, or possession of the note sued on, but was merely the agent of L. M. Wiley & Co. The person of the pleader then suddenly changes; Keith vanishes, and L. M. Wiley & Co. continue the averments, alleging that the notes are theirs, etc.

To this amended petition the defendant excepts, on the ground that it attempts to introduce an entirely new party into the suit, and pleads also a general denial. The exception was overruled. This has been assigned as error, but upon the facts which are alleged in the amended petition, there was no error in overruling the exception. The plaintiff, Charles Keith, in the amended petition, admits that he was not the owner of the notes, but that he held them merely as the agent of L. M. Wiley & Co., and Wiley & Co. pray to be substituted as plaintiffs. This was but a substitution of the principals for the agent, with the consent of the agent himself, and was not properly the making of a new party. But if the principals were new parties, the defendant could not object on that account alone, unless he were thereby deprived of some substantial defense, nor could he, on the admission of new parties, be subject to the costs thus far in the suit expended: *Henderson v. Kissam*, 8 Tex. 46. There was no error in overruling the exception to the amended petition, as it stood upon its allegations.

But when the judgment is examined, its recitals show a state of facts under which L. M. Wiley & Co. were made parties plaintiffs, quite different from that to be inferred from the amended petition. The judgment shows that Keith was dead before L. M. Wiley & Co. attempted to introduce themselves as parties. The amended petition leads to a different conclusion, viz., that Keith was alive, and introduces his principals, who then

take up the averments. The judgment commenced as follows: "This day come the parties by their attorneys, and the death of the plaintiff being suggested, L. M. Wiley & Co., by attorney, make themselves parties plaintiffs," etc. The manifest inference is, that L. M. Wiley & Co. were made parties after the death of Keith; and though the exception to the amended petition was properly sustained, yet the question is, whether under the facts as they truly existed, and as they must have been known to the court, as appears from the judgment itself, L. M. Wiley & Co. should have been allowed to come in as parties plaintiffs, and have the judgment entered in their name against the defendant. Charles Keith was the sole plaintiff in the original petition. On his death the suit abated, unless his legal representatives either came in voluntarily or were brought in and made parties plaintiffs: Hart. Dig., art. 697. Had Keith sued for the use of L. M. Wiley & Co., and had this appeared from the petition, the suit would not have abated by his death, but might have been prosecuted by the beneficiaries to judgment: Hart. Dig., art. 701. Their right would then have appeared of record. But after the death of a plaintiff suing for himself, the suit can be revived and continued only in the name of his legal representatives. Persons claiming the real ownership of the notes can, if they choose, contest their rights with such representatives, and if established, may claim judgment in their names, and this in the same suit, provided such change of parties shall not deprive defendant of a substantial defense to which otherwise he would have been entitled.

Judgment reversed and cause remanded.

Reversed and remanded.

AMENDMENTS SUBSTITUTING NEW PARTIES PLAINTIFF: See *Hubler v. Pullen*, 68 Am. Dec. 620, and note. Where a suit has been instituted by administrators for the use of a woman, she is the real plaintiff, and an amendment substituting her name as plaintiff is not strictly the making of a new party: *Martel v. Somers*, 26 Tex. 558, citing the principal case.

ABATEMENT OF ACTION BY DEATH OF PARTY: See *Petts v. Ison*, 56 Am. Dec. 419; *Cowan v. Campbell's Adm'r*, 66 Id. 184, and notes. If a suit be instituted in the name of one party, purporting on its face to be for the benefit of another, then, on the death of the nominal plaintiff, the suit may proceed in the name of the beneficiary, without reviving it in the name of the representatives or heirs: *Moore v. Rice*, 51 Tex. 292; otherwise where it does not so purport: *Sise v. Malsch*, 54 Id. 360, both citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED GENERALLY to the point that a party who is or may be affected by a judgment, if he does not appear, must be brought in by process, in *Bryan v. Lund*, 25 Tex. 99.

SHELTON v. BERRY.

[19 TEXAS, 154.]

AFFIDAVIT IS VOLUNTARY OATH REDUCED TO WRITING, taken before some authorized officer, and certified by him.

AFFIDAVIT MUST BE IN WRITING, BUT NEED NOT BE SIGNED by the deponent.

AFFIDAVIT TO CLAIM AGAINST DECEDENT'S ESTATE, NOT PURPORTING TO BE BY OWNER of the claim or by his agent, and not stating the deponent's means of information, affords no justification for the rejection of the claim by the administrator, unless he puts his objection on that ground.

ERROR to reverse a judgment for the defendant in an action against an administrator to recover a claim rejected by him on the ground that it was barred by the statute of limitations. On the trial, the authentication of the claim was objected to, on grounds sufficiently appearing from the opinion. The objection was sustained, the defendant had judgment, and the plaintiff brought error.

J. M. Crockett, for the plaintiff in error.

J. E. Cravens, for the defendant in error.

By Court, **WHEELER, J.** An affidavit is defined by Blackstone to be "a voluntary oath before some judge or officer of the court, to evince the truth of certain facts:" 3 Bla. Com. 304. In practice, it means "an oath or affirmation reduced to writing, sworn or affirmed before some officer who has authority to administer it:" Bouv. Law Dict., tit. Affidavit; Burrill, Id.; Tomlin, Id. It must be in writing. Such is the requirement of the statute: Hart. Dig., art. 1158. But neither the statute nor any general principle of the law requires that it be signed by the deponent. That does not enter into its definition, nor is it essential. It is sufficient that it be made before an officer authorized by the law to administer it, and that he reduce it to writing, and certify officially to the fact of its having been made before him. The affidavit in the present case was therefore sufficient. The objection that it was not made by the owner of the claim is not tenable. Where the administrator would reject a claim because it is authenticated by the affidavit of a person who does not purport to be the owner thereof, or the agent of the owner, and does not state the means of information of the deponent, he must make that the ground of his rejection of the claim: *Dunn v. Sublett*, 14 Tex. 521; *Hansell v. Gregg*, 7 Id. 223. Here he placed his rejection upon a different ground.

We are of the opinion that the claim was well authenticated, and that the court erred in excluding it, for which the judgment must be reversed and the cause remanded.

Reversed and remanded.

AFFIDAVITS, SUFFICIENCY OF, GENERALLY: See the notes to *Ex parte Bank of Monroe*, 42 Am. Dec. 63. An affidavit must be taken by authorized officer: *Wyatt v. Jeffries*, 43 Tex. 155; and must be certified by him: *Morris v. State*, 2 Tex. App. 503, both citing the principal case.

PROOF OF CLAIM AGAINST DECEDENT'S ESTATE: See *Riggs v. Martin*, 41 Am. Dec. 103. In *Walters v. Prestidge*, 30 Tex. 65, 74, it was held that an administrator rejecting a claim for insufficient authentication, if his objection goes to the person making the affidavit, must state that objection in his memorandum of rejection, or he cannot rely on it when sued: but that this rule does not apply where his objection goes to the words or form of the affidavit, distinguishing the principal case. The court say: "It is insisted by the counsel for the appellee that if the claim was rejected on account of insufficient authentication, this reason should have been given in the indorsement of the administrator, so that it could have been properly authenticated and again presented, and that having failed to do this, and rejected it generally, he is precluded from relying on that reason now, but must litigate it on its merits. We are referred in support of this position to *Hansell v. Gregg*, 7 Tex. 228; *McIntosh v. Greenwood*, 15 Id. 116; *Dunn v. Sublett*, 14 Id. 521; *Shelton v. Berry*, 19 Id. 154; and *Alford v. Cockrane*, 7 Id. 488. We have carefully examined these cases, and find nothing in any of them to support the position assumed by counsel. The result of these cases is, in substance, that where a claim against an estate is authenticated according to the requirements of the statute, but by the affidavit of a person who does not purport to be the owner thereof, or the agent of the owner, if the administrator would reject the claim on that ground, he must state such cause specially in his rejection, and cannot raise it for the first time when sued for the establishment of the claim. The rulings of the court in these cases we believe to be entirely correct. The statute has not declared by whom the affidavit shall be made; it only provides that the claims when presented shall be 'accompanied by an affidavit in writing.' It is left to the judgment and discretion of the administrator to decide whether the affidavit is made by the proper person who is cognizant of the fact: *Dunn v. Sublett*, 14 Id. 521. No such discretion is left with the administrator with reference to the affidavit of authentication. If this be wanting in any of the essential requisites prescribed by the law, he is forbidden to allow the claim; and if he does allow it under such circumstances, his act is expressly declared to be of no force or effect."

ROSS v. SMITH.

[19 TEXAS, 171.]

ONLY INSTRUMENTS WHICH ARE TRANSFERABLE BY DELIVERY ARE BILLS and notes payable to bearer, or payable to order, and indorsed in blank. **POSSESSION OF NOTE PAYABLE TO ORDER BUT NOT INDORSED BY PAYEE** is not sufficient evidence of title to sustain an action on the note by one not payee.

APPEAL from judgment against the appellant in an action brought by him on a note. The facts appear from the opinion.

M. Casey, for the appellant.

W. Stedman, for the appellee.

By Court, HEMPHILL, C. J. The appellant, who was plaintiff below, brought suit against the appellee on the following note:

“ \$132.10. .

January 1, 1855.

“ One day after date, I promise to pay to the order of C. Vincent one hundred and thirty-two dollars and ten cents, value received, with interest at the rate of ten per cent per annum, from maturity, until paid.

JAMES E. SMITH.”

The note was read to the jury as evidence, against the objection of the defendant that the plaintiff had not offered any proof of ownership. But in the charge, the court instructed the jury that the plaintiff was not entitled to recover, unless they were satisfied from the proof that the plaintiff was the owner of the note; and that possession of the note was not sufficient proof of ownership.

The note being the only evidence offered, the jury found for the defendant, and the plaintiff appealed.

The note was not indorsed specially to the plaintiff, nor was it indorsed in blank; and the only question is, whether the mere possession without proof of a *bona fide* assignment or transfer, either by parol or writing, was *prima facie* evidence of ownership.

The only instruments in which the law recognizes the property as passing, like coin, with the possession, are those termed negotiable, and which are transferable by delivery; viz., bills and notes payable to bearer, or payable to order and indorsed in blank. The legal right to the property secured by such instruments passes by delivery, and the possession is *prima facie* evidence of right in the property. Such instruments pass by delivery from hand to hand; and though they may have been lost or stolen from the true owner, yet the possession of the holder is *prima facie* proof of right, and if he be a *bona fide* transferee for value, his title will be perfect, whether the one from whom he received the instrument had any title or not: *Miller v. Race*, Smith's Lead. Cas. 258, notes; *Greeneaux v. Wheeler*, 6 Tex. 523; Story on Prom. Notes, secs. 43, 196.

But such is not the rule with reference to instruments not negotiable, or which do not pass the legal right by delivery. A

third person not a party to such note must show by what right he claims to recover from the debtor, or in other words, that he holds under a *bona fide* assignment, valid in law, from the owner of the note.

The defendant, by his counsel, has insisted, and shown from numerous authorities, that a chose in action may be assigned verbally or by delivery, as well as in writing: *Heath v. Hall*, 4 Taunt. 326; *Jones v. Witter*, 13 Mass. 304; *Dunn v. Snell*, 15 Id. 485-487. An assignment of a debt may be by parol as well as by deed: 2 Story's Eq. Jur., sec. 1047. A delivery of a chose in action for a valuable consideration is sufficient, and passes the title: *Briggs v. Dorr*, 19 Johns. 96. He also insists that to make the parol assignment good against the debtor, it is not necessary that the assignee should give notice of the assignment to the debtor.

It is no doubt true that the assignment of a debt does not, in equity, require the assent of a debtor, although it may be important to the assignee that such notice should be given, or otherwise the rights of third persons may intervene to his prejudice: 2 Story's Eq. Jur., sec. 1057. To give an action at law, it seems that the debtor must consent to the agreed transfer of the debt; but in equity it is otherwise: *Ex parte South, in re Row*, 3 Swanst. 392; *Tibbitts v. George*, 5 Ad. & El. 114. There is no doubt that an assignee, by parol or delivery, of an unnegotiable note is entitled at law to sue the maker in the name of the assignor, and in equity to bring suit in his own name.

The only question is, whether the mere possession of such instrument will authorize the holder to bring suit, or whether he must prove the fact of delivery or transfer for a valuable or other sufficient consideration: *Harris v. Clark*, 2 Barb. 94; S. C., 3 N. Y. 93 [51 Am. Dec. 352]; Story's Eq. Jur., sec. 607. And it seems clear that he must prove that he came honestly and for a sufficient consideration into possession. Where the legal right to the debt, secured by a negotiable note, passes by delivery, the law, for the benefit of commerce, has recognized the property as passing with the possession; and that possession is consequently *prima facie* evidence of title. But this is an exception to the rule by which property is proved in personal chattels, and it does not extend to the possession of notes which are not negotiable. The possession of such note, without other proof, does not give the holder the right of judgment on the note: *Merlin v. Manning*, 2 Tex. 351.

Judgment affirmed.

POSSESSION OF NOTE OR BILL AS EVIDENCE OF TITLE: See *Ellicott v. Martin*, 61 Am. Dec. 327; *Pickens v. Yarrowborough's Adm'r*, 62 Id. 728; *Way v. Richardson*, 63 Id. 760; *Pettee v. Prout*, Id. 778; *Conwell v. Pumphrey*, 68 Id. 611. Mere possession of a note payable to bearer, unless there is evidence to impeach the holder's right, is sufficient proof of title to enable him to sue thereon: *Rider v. Duval*, 38 Tex. 624. And a note payable to order and indorsed in blank is in the same category, being deemed payable to bearer: *Johnson v. Mitchell*, 50 Id. 214. But mere possession of a non-negotiable note, without more, is not sufficient: *Merrill v. Smith*, 22 Id. 54; *Balf's Heirs v. Hill*, 38 Id. 241. The principal case is cited in each of the above decisions.

MURRAY v. ABLE.

[19 TEXAS, 213.]

VENDOR'S LIEN MAY BE ENFORCED BY TRANSFEREE OF NOTE payable to bearer, given for the purchase price of land, where the lien is reserved in the note.

ERROR to reverse a judgment for the plaintiff in an action on certain notes. The facts are stated in the opinion.

J. T. Murray, for the plaintiff in error.

By Court, ROBERTS, J. Able sues for the use of Mills & Jockusch, on notes given to Able in the purchase of land, and the vendor's lien on the land is expressly reserved in the notes. The petition seeking to enforce the lien is excepted to, because, the notes being transferred for value, and being payable to bearer, the lien did not pass with the notes to Mills & Jockusch.

It has been decided that a party holding a negotiable note, under a written indorsement from the payee, has acquired and may enforce the vendor's lien: *Moore v. Raymond*, 15 Tex. 554. At this term of the court the same has been decided in favor of one holding a note payable to bearer.

This having, until lately, been considered a doubtful question, and having been raised and relied on below, judgment will be affirmed without damages.

Judgment affirmed.

VENDOR'S LIEN, WHETHER PASSES TO ASSIGNEE OR TRANSFEREE OF NOTE given for purchase of land: See *Briggs v. Hill*, 38 Am. Dec. 441; *Knisely v. Williams*, 46 Id. 193; *Wellborn v. Williams*, 52 Id. 427; *Conner v. Banks*, Id. 209; *Moore v. Anders*, 60 Id. 551, and notes. The principal case is cited in *White v. Downs*, 40 Tex. 232, and *Flanagan v. Cushman*, 48 Id. 244, to the point that unless a contrary intent appears, the assignment of a note for the purchase of land carries the vendor's lien.

WHETHER TRANSFER OF DEBT GENERALLY TRANSFERS LIEN SECURING IT, see *Stewart v. Preston*, 44 Am. Dec. 621; *Terry v. Woods*, 45 Id. 274; *Roberts v. Halstead*, 49 Id. 541, and notes. The principal case is cited to the point generally that such transfer does carry the lien, in *Cannon v. McDaniel*, 46 Tex. 309.

MILLS v. HOWETH.

[19 TEXAS, 257.]

COPY OF RECORD OF SUIT IS BEST EVIDENCE OF PARTICULAR INDEBTEDNESS of the defendant in execution, in a proceeding to enforce the execution against property alleged to have been fraudulently transferred by such defendant.

PAROL EVIDENCE OF INDEBTEDNESS OF VENDOR IN TRANSFER FRAUDULENT AGAINST CREDITORS is competent, it not appearing that the indebtedness was evidenced by writing.

TRANSFER IS FRAUDULENT AGAINST CREDITORS, THOUGH MADE FOR VALUABLE CONSIDERATION, if not made in good faith, but with the intent to hinder, delay, or defraud creditors.

PROOF OF VENDOR'S ACTUAL PARTICIPATION IN FRAUD OF VENDOR in sale fraudulent as to creditors is not necessary; knowledge of the fraudulent intent or of facts sufficient to put a prudent man upon inquiry is sufficient.

APPEAL from a judgment for the claimant, in a trial of the right of property in certain goods transferred to said claimant by one Walton. The question was, whether or not said transfer was made to hinder, delay, or defraud creditors. The goods have been levied on under an execution from Galveston county, upon a judgment in favor of Mills & Co. and against John P. Walton & Co. The plaintiffs in execution offered one Mills as a witness to prove the indebtedness upon which the judgment was rendered, but the evidence was rejected on objection by the claimant. They then offered in evidence a copy of a note from Walton & Co. to Mills & Co., certified by the clerk to be a true copy of the note filed in the action in which judgment was recovered. This evidence was also rejected. Mills was again offered as a witness, and asked if he knew of any indebtedness from Walton & Co. to Mills & Co. prior to the day of trial of the action in question, but upon the claimant's objection, his testimony was again rejected. After verdict and judgment for the claimant, the plaintiffs appealed.

E. H. Horrell, for the appellants.

J. E. Cravens and R. A. Reeves, for the appellee.

By Court, WHEELER, J. A copy of the record of the suit in Galveston would have been the best evidence of the particular indebtedness of the defendant in execution, which the plaintiffs were seeking to enforce. But it was competent to prove other indebtedness, either to the plaintiffs or other parties, by any witness who knew the fact. The court therefore erred in refusing to permit the witness Mills to testify to the existence of such indebtedness. It does not appear that it was proposed to prove by him any indebtedness evidenced by writing; and it is not perceived on what ground his testimony was excluded. If the record truly embodies the evidence as it was given upon the trial, it does seem that the charge of the court presented a view of the case more favorable to the plaintiff than the facts warranted. The old firm of Walton & Co. was sunk and merged in the new firm of F. C. Howeth & Co. contemporaneously with the transfer of the goods. At the same time that Walton made a transfer ostensibly of his entire stock in trade, he secretly retained an interest, and was a member of the new firm, in which, however, his name did not appear. His indebtedness was known to the members of the new firm; and if the transfer and introduction of new members under a new firm name was not a contrivance to shelter and protect the goods from creditors, it certainly bears that appearance. Where there is evidence of fraud so convincing, the proof to rebut it ought to be very satisfactory. The charge of the court seems obnoxious to the objection that it gave undue importance to circumstances relied on for that purpose, which there is reason to believe were contrivances to cloak and conceal the fraud. It is not enough that the transfer may have been for a valuable consideration; it must have been *bona fide* also, and not made with the intent to hinder, delay, or defraud creditors. Nor is it necessary to prove an actual participation in the fraud on the part of the vendee. If he knew of the fraudulent intent of his vendors, or had knowledge of facts sufficient to excite the suspicions of a prudent man and to put him upon inquiry, it is sufficient: *Thompson v. McGreal*, 10 Tex. 393; *Edrington v. Rogers*, 15 Id. 188. These principles were not distinctly brought to view by the charge of the court, and there is reason to apprehend that its effect, as a whole, was to cause the jury to lose sight of them. But it is not necessary to determine whether there is anything in the charge of the court, or in the refusal of a new trial, which would require a reversal of the judgment, as it is clear that it must be reversed on account of the rejec-

tion of the testimony of the witness Mills, and the parties will probably come better prepared on the law and facts of the case upon another trial. The judgment is reversed and the cause remanded.

Reversed and remanded. —

TRANSFER OR CONVEYANCE FOR VALUE, WHEN FRAUDULENT AGAINST CREDITORS, AND WHEN NOT: See *Worland v. Kimberlin*, 44 Am. Dec. 785; *Brown v. Foree*, 46 Id. 519; *Peck v. Land*, Id. 368; *Hutchinson v. Horn*, 50 Id. 470; *Merry v. Bostwick*, 54 Id. 434; *Rogers v. Evans*, 56 Id. 537; *Kuykendall v. McDonald*, 57 Id. 212; *Covanhovan v. Hart*, 60 Id. 57, and notes.

VENDEE'S KNOWLEDGE OF AND PARTICIPATION IN VENDOR'S FRAUD IN TRANSFER: See *Worland v. Kimberlin*, 44 Am. Dec. 785; *Brown v. Foree*, 46 Id. 519; *Anderson v. Roberts*, 9 Id. 235; *Garland v. Rives*, 15 Id. 756.

THAT QUESTION OF FRAUDULENT INTENT IN CONVEYANCE to hinder, delay, or defraud, creditors is one of fact for the jury, but that their verdict, if clearly against evidence, may be set aside, is a point to which the principal case is cited in *Weisiger v. Chisholm*, 28 Tex. 792; see *Pettibone v. Stevens*, 38 Am. Dec. 57; *Briscoe v. Bronaugh*, 46 Id. 108; *Dodd v. McCraw*, Id. 301; *McMichael v. McDermott*, 55 Id. 560; *Billings v. Billings*, 56 Id. 319; *Kuykendall v. McDonald*, 57 Id. 212; *Jessup v. Johnson*, 67 Id. 243, and notes upon the general subject as to when fraud is a question of fact, and when a question of law.

COOPER v. SINGLETON.

[19 TEXAS, 260.]

DEFECT OF TITLE TO LAND IS GOOD DEFENSE TO VENDEE in an action for the purchase money, so long as the contract is executory; and the vendor must show that the vendee purchased at his own risk, and with knowledge of the defect, or that he agreed to take such title as the vendor had.

VENDEE IN EXECUTED CONTRACT FOR REALTY CANNOT RESIST PAYMENT of the purchase money for defect or failure of title, as a general rule, both in England and in the United States; but unless there have been fraudulent representations, must pay the money, and rely upon the covenants in his deed; but the rule is otherwise in Texas, and the vendee, after conveyance, may resist payment for a total failure of title, though there be no fraud, and is not compelled to resort to his covenants, especially where the vendor is or may be insolvent or beyond the reach of the court, unless the vendee takes a conveyance with warranty, with knowledge of the defects, when he cannot resist payment unless he has been evicted.

DISTINCTION BETWEEN LIABILITIES OF VENDER IN EXECUTORY AND VENDER IN EXECUTED CONTRACT for the sale of realty is that the former should be relieved from payment on showing defect of title, unless the vendor shows that he knew the defect at the sale, and consented to take such title as the vendor had; while the vendee in an executed contract, to escape payment, should show, beyond doubt, failure of title in whole or in part, danger of eviction, and circumstances *prima facie* re-

selling the presumption that he knew, and took the risk of the defect at the time of the sale.

PLEA OF VENDEE IN EXECUTED CONTRACT MUST AVER WANT OF KNOWLEDGE OF DEFECT IN TITLE to the land purchased, where he seeks to defeat a recovery of the purchase money on the ground of such defect.

DEFENSE OF DEFECT OR FAILURE OF TITLE IS OF EQUITABLE NATURE in an action to recover the price of land sold, and a plea setting up such defense should aver facts which would warrant relief in equity.

PLEA BY HUSBAND'S VENDEE THAT TITLE IS DEFECTIVE BECAUSE PROPERTY WAS COMMUNITY PROPERTY, and that the vendor's wife is dead leaving several children, should show the condition of the community estate, so as to negative any idea that the heirs may be satisfied out of other property, in an action for the purchase money.

ALLOWING PARTY TO EXCEPT TO PLEADINGS ORALLY, the exceptions to be afterwards reduced to writing, where the trial proceeds without such written exceptions, and they are filed long after adjournment, is no ground of reversal; as in case of a demurrer to an answer submitted orally and not filed until many months after the adjournment.

APPEAL from a judgment for the plaintiff in an action on certain notes. The facts are stated in the opinion.

M. Casey, for the appellant.

Lewis and Flanagan, for the appellee.

By Court, **HEMPHILL, C. J.** Suit on two notes executed by the appellant Cooper, payable to William Crisp or bearer.

The defendant pleaded, in substance, that the notes were given in part for the purchase money of a tract of land of one hundred and sixty acres, which is described by its boundaries; that the tract was sold to defendant by William Crisp, the payee in the notes, on the day of their date, viz., the twenty-sixth of September, 1854; that on that day the said Crisp, in consideration of the sum of seven hundred dollars, of which the said notes constituted a part, executed a warranty title deed to defendant for the land; that the tract, before the date of the said deed, had been the common property of the said Crisp and his wife, Eliza, both of whom with their family resided upon the land for about three years, until, in the year 1854, the wife of the said Crisp died on said land; and that after the death of said Crisp's wife the land was sold, as above stated, to defendant by the said Crisp. The plea further states that the said Eliza Crisp left several children, who are yet alive, some of them married, some minors, some residing in this state, and others in other states; that there has never been any administration on the estate of Eliza Crisp; that the above-named heirs are entitled to one undivided half of said tract of land; that all the pur-

chase money except the notes sued on has been paid to Crisp; that the plaintiff, Singleton, if he obtained the notes sued on before they became due, had full notice that they were executed for the consideration above mentioned. By amendment, the defendant averred that the notes were not the property of the plaintiff, but of the payee, William Crisp, and that the consideration of the said notes had wholly failed. The plaintiff demurred to the plea. The demurrer was sustained, and the jury found for the plaintiff.

The important question in the cause is, whether the matter of the plea was a valid defense to the action.

It will be observed that the contract for the purchase of the land was not executory, but executed. The vendee had received his deed, with covenants of warranty. Had the contract been executory, the defense as stated might have *prima facie* been sufficient. The general rule is, that as long as the contract remains executory, the purchaser shall not be compelled to pay the purchase money and take a defective title, except the purchase has been made at his own risk, or he has agreed to accept such title as the vendor can give: *Brown v. Haff*, 5 Paige, 235 [28 Am. Dec. 425]. Nor will the mere fact that the vendee has gone into and remained in possession amount in itself to a waiver of objection to the title: *Jones v. Taylor*, 7 Tex. 244. That the title is defective, is a good defense to the vendee, under contract *in fieri*, and it devolves upon the vendor to show, by direct evidence or by circumstances, that the vendee was purchasing at his own risk, and with a knowledge of the defects of the title, or that he would take such title as the vendor could make.

But when the title has been passed, and the deed executed, the purchaser cannot, according to the doctrine in England and in most of the states, resist the payment of the purchase money on the ground merely of defect or failure in the title. Where there has been no fraudulent representations on the part of the vendor as to the title, the general rule is, that the vendee under a deed must pay the purchase money, and rely upon the covenants in his warranty for redress; and if there be no fraud and no covenants, he is not entitled to any relief: *Craddock v. Shirly*, 3 A. K. Marsh. 288; *Miller v. Long*, Id. 334; *Halley v. Oldham*, 5 B. Mon. 239; *Lighty v. Shorb*, 3 Penr. & W. 447 [24 Am. Dec. 334].

But such is not the rule as recognized by the courts of this state. The doctrine in *Tarpley v. Poage's Adm'r*, 2 Tex. 139, is

to the effect that though there may be a deed with covenants of warranty, yet the vendee may resist the payment of the purchase money in cases where the title has turned out to be wholly defective, or there be a valid outstanding title in others; that where there clearly was no title in the vendor, the purchaser is not compelled to pay, and then, after eviction, seek his remedy on the covenants of his deed, especially where the vendor is or may probably be insolvent, or beyond the reach of the court. The rule in that case is not upon the ground of fraud in the vendor, but of such failure of title as exposes the vendee to the danger, or in fact to the certainty, of eviction.

No question was raised in that case as to whether the purchaser had, prior to the sale, knowledge of the defects of the title. But in the subsequent case of *Brock v. Southwick*, 10 Tex. 65, it was held that where a vendee under a deed with warranty accepted the title with knowledge of its defects, he could not resist the payment of the purchase money unless he had been evicted.

In the case of *Turpley v. Poage's Adm'r*, 2 Tex. 139, reference was made to cases in South Carolina and in Pennsylvania. The reports from South Carolina are not accessible, but I will refer more fully to the cases from Pennsylvania.

The first and leading case on the subject of the detention of the purchase money is that of *Steinhauer v. Whitman*, 1 Serg. & R. 438. The vendee was in under a deed of special, not general, warranty. He had been evicted from a part of the premises by title paramount to that of the vendor. He set up this eviction in defense against a suit for the purchase money, and the doctrine maintained in the case, as condensed by Justice Kennedy in the subsequent case of *Roland v. Miller*, 3 Watts & S. 390, was, that if the consideration money had not been paid, the purchaser, unless it appeared that he had agreed to run the risk of the title, may defend himself in an action for the purchase money, by showing that the title was defective either in whole or in part, whether there was a covenant of general warranty, or a right to convey, or of quiet enjoyment by the vendor, or not, and whether the vendor has executed a deed of conveyance for the premises or not.

The rule as established in this case in 1815, and which was founded upon long-established usage, has not been departed from in later cases in the courts of Pennsylvania. It has been the subject of severe comment, but has maintained its ground as an established rule of law. It was affirmed in *Hart v. Por-*

ter's Ex'rs, 5 Serg. & R. 201, with the qualification that if the vendee knew of the defect at the time of the purchase, without stipulating for a covenant as security against it, he consents, in effect, to take the risk of the purchase on himself. Other decisions followed, and the result of the previous cases was in *Lighty v. Shorb*, 3 Penr. & W. 452 [24 Am. Dec. 334], stated to be this: that where there was a known defect, but no covenant or fraud, the vendee can avail himself of nothing. But where there is a covenant against a known defect, he shall not detain the purchase money unless the covenant has been broken; or in other words, he must perform his engagement whenever his knowledge and the state of the facts continue to be the same they were at the time of the conveyance.

In *Ludvick v. Huntringer*, 5 Watts & S. 51, decided in 1842, it is held that a superior, indisputable, outstanding title in a third person is a good defense against the payment of the purchase money, although a deed of conveyance has been executed, unless it was explicitly agreed and understood between the parties at the time of the sale that the vendee was to take the title at his own risk. But the outstanding title must be indubitably good. But where the contract for the purchase is *in fieri*, there, if it should appear that the title of the land is anywise doubtful, the vendee will not be held to pay the purchase money, unless it should appear that he so expressly agreed: *Sidebotham v. Barrington*, 5 Beav. 261; *Dorsey v. Jackman*, 1 Serg. & R. 42.

In *Ross's Appeal*, 9 Pa. St. 496, it is said that the doctrine of *Steinhauer v. Whitman*, 1 Serg. & R. 438, is not of universal application. It does not extend to cases where it is expressly stipulated or shown by circumstances to be the understanding of the parties that the vendee was to take upon himself the risk of a defect of title or an incumbrance.

I have cited thus largely from these reports, not with the intention of expressing an indiscriminating assent to all the doctrines in the cases cited, but for the reason that the general doctrine of the cases as to the justice of detaining the purchase money where the title has failed, though there may have been no eviction, is more analogous to our own rule than that recognized in other courts, with the exception of those of South Carolina.

The plea in the case on hand avers the title of the vendor to be defective, but does not state when that fact came to his knowledge. He admits that he has the vendor's deed with warranty. He does not allege that there was fraudulent representation, or even concealment, on the part of the vendor. He alleges

merely defect of title, and he certainly should aver, in order to show that he has equity, that he did not know of the defect at the time of sale. If he be exempted from the necessity of abiding eviction, and then resorting to his covenants, he should aver such facts as would in equity and justice entitle him to relief. As long as the contract for the sale is *in fieri*, the vendor, to enforce payment, should show, where the vendee relies upon defect of title, that the latter had purchased at his own risk; but when it is executed, when there is a conveyance, and the land will not revert to the vendor though there may be default in payment of the purchase money, when the vendee has the covenants of the vendor for his ultimate security, the burden should be upon the vendee to show such facts as would relieve him from the payment. He should aver such facts as would, if true, authorize the court to grant the relief; and if he have a deed with warranty, he ought not to be released from payment, unless in case of fraud on the part of the vendor, or of defect in the title not known to the vendee at the time of the sale. He cannot require of the court to institute any inquiries, unless on averments stating fully all the facts and repelling conclusions as against the equity sought on his behalf. He cannot be required to prove a negative, but he can prove the facts and circumstances of the sale; and if from these no inferences arise that the purchase was to be at his risk, and no proof establishing such fact is offered by the vendor, he ought to be let in to his defense.

The difference between the liabilities of the vendee under an executory and executed contract is this: that in the former he should be relieved by showing defect of title unless on proof by the vendor that this was known at the sale, and it was understood that such title should be taken as the vendor could give. In the latter the vendee should establish beyond doubt that the title was a failure in whole or in part; that there was danger of eviction, and also such circumstances as would *prima facie* repel the presumption that at the time of the purchase he knew and intended to run the risk of the defect.

Some defects of title are less known or open to observation than others; and none, in times that are past, have been more hidden or less known than those enveloped in the obscurity of community rights.

The plea in this case does not aver a want of knowledge of defect in the title at the time of the purchase, and on that ground is defective.

It is insufficient in other particulars. There has been no administration on the estate of Mrs. Crisp, as is averred; and in a limited sense it is true that her heirs are entitled to the one half of the land. But their interest may be subject to great modifications, and ultimately may be altogether excluded. They are entitled, truly, to the half of such portion of the common property as may remain after the payment of the debts of the community. There may be, also, a large amount of community property in addition to the land in question. If such be the fact, the portions of the heirs of the wife may be satisfied out of the other assets, and this, being assigned to the vendor as his share of the common property, would inure to the benefit of his vendee, the defendant. The plea should have averred the condition of the community estate. The jurisdictions of both law and equity are or may be exercised in every case in which it may be necessary to exert the power or apply the principles of either, or of both law and equity.

Defenses of the character of the plea in this case are peculiarly of equitable cognizance, and the pleadings should aver all such facts as would give relief in equity. If the title be a total failure, and if the equities of the case be such that the vendee should not be condemned to the distant, and perhaps fruitless, appeal to his warranty, the vendee should pray for rescission for refunding such portion of the purchase money as has been advanced, and offer to surrender his deed, and also that the respective equities of the parties as to rents and profits on the one hand, and improvements on the other, may be adjusted; or if title to only a portion of the land has failed, to release and reconvey the vendee's right to that portion. Or if the title has not wholly failed, and it can be ascertained in a reasonable time whether there will be eviction, the remedy should be by injunction to restrain the collection of the purchase money until the danger from the outstanding title has passed; and for this purpose, the parties who claim under the outstanding title may be made parties, and required to assert or relinquish their claim to the land. There are numerous cases in the Kentucky reports in which this character of equity has been administered, with the additional fact that the vendor was insolvent, and consequently a suit on his covenants would avail nothing: *Simpson v. Hawkins*, 1 Dana, 303. But it is unnecessary to recapitulate the pleas which should be set up in supposed cases. It should be remembered that the defense is equitable, and that equity cannot be done by halves. In this case there might be

some apparent equity in refusing to allow the collection of the notes, on the ground that the vendee had already paid more than half of the purchase money, and that *prima facie* the interest of the vendor is but one half. But the vendee should have alleged ignorance of the state of the title, and also stated such facts as would show that ultimately he would most probably not be able to secure the whole of the land.

We are of opinion that the demurrer was properly sustained.

The judgment states that the demurrer of plaintiff to defendant's answer was sustained. It appears, however, from a bill of exceptions, that after the parties announced readiness, and the pleadings being read, the plaintiff objected orally to defendant's answer and amended answer, alleging, among other matters, want of title in the land, the plaintiff claiming that the amended answer was not filed until after the time fixed for pleading at the present term, that he had no notice of said amended answer, and prayed permission to withdraw his announcement of readiness and except to said answer and amended answer, which was allowed, and the court allowed said plaintiff to make and argue said exceptions orally, but to be reduced to writing afterwards and filed; and the trial progressed without such written exceptions. This is assigned as error. But, at most, this appears to be but an irregularity which was admitted to facilitate the dispatch of the business.

The judgment shows that there was a demurrer, and that it was acted upon by the court. The demurrer has been since filed, though many months after the adjournment of the court. The irregularity is not sufficient ground for the reversal of the judgment, and it is ordered that the same be affirmed.

Judgment affirmed.

DEFECT OF TITLE, VENDEE'S RIGHT TO RELIEF ON GROUND OF: See *Walker v. Quigg*, 31 Am. Dec. 452; *Cullum v. Branch Bank*, 37 Id. 725; *Coleman v. Rowe*, Id. 164; *Woodruff v. Bunce*, 38 Id. 559; *Rohr v. Kindt*, 39 Id. 53; *Gans v. Renshaw*, 44 Id. 152; *Miles v. Stevens*, 45 Id. 621; *Pick v. Percy*, Id. 303; *Thomson v. Carpenter*, Id. 681; *Lynch v. Baxter*, 51 Id. 735; *Salmon v. Hoffman*, 56 Id. 322; *Dwight v. Cutler*, 64 Id. 105; *Bryant's Ex'r v. Boothe*, 68 Id. 117, and notes. The principal case is cited to various points connected with this subject, as follows: The distinction laid down in the case between the liabilities of vendees in executed and vendees in executory contracts for the purchase of land, where a defect of title is claimed, is approved in *Hurt v. McReynolds*, 20 Tex. 599; *Hurt v. Blackburn*, Id. 605; *Dorst v. Trammell*, 26 Id. 128; *Rock v. Heald*, Id. 525; *Baldrige v. Cook*, Id. 569, 570. A vendee, in an executed contract to escape liability for the purchase money, must show beyond doubt that the title has failed wholly or partly, and that he has been evicted or is in danger of eviction: *Johnson v. Long*, 27 Id. 22.

Price v. Blount, 41 Id. 475. On the other hand, if the contract remains executory, the vendee can resist payment on account of a defect in the title, unless he is shown by the vendor to have known of the defect at the time of the sale, or to have consented to assume the risk of it, taking such title as the vendor had: *Smith v. Nolen*, 21 Id. 497; *Littlefield v. Tinsley*, 22 Id. 260; S. C., 26 Id. 354; *Green v. Chandler*, 25 Id. 156, 157. The court may unquestionably protect the purchaser when sued for the purchase money in such a case: *Gober v. Hart*, 36 Id. 141. A purchaser who goes into possession under a defective title, having received his deed, may resist payment, but he must restore the possession and give his deed for cancellation: *Dumaret v. Bennett*, 29 Id. 267. The case is cited also as to what is a sufficient plea of failure of title in an action against a vendee for the purchase money, in *Luckie v. McGlasson*, 22 Id. 235; *Herron v. De Bard*, 24 Id. 182; *Lemmon v. Hanley*, 28 Id. 223, 224; *Tooke v. Bonds*, 29 Id. 424, 425. So, as to what constitutes a good petition to set aside a contract on the ground of fraud and failure of consideration, in *Johnston v. Powell*, 34 Id. 530. So it is cited as to what constitutes an answer sufficiently excusing a failure to pay by a vendee to prevent a forfeiture of his contract: *Motell v. Cole*, 52 Id. 177.

AS TO RIGHTS OF CHILDREN TO HALF OF COMMUNITY PROPERTY, where the mother dies during coverture, the case is cited in *Mages v. Rice*, 37 Tex. 500. As to the rights of the spouses in community property generally, see *Wheat v. Owens*, 65 Am. Dec. 164, and cases cited in the note thereto.

PRYOR v. STONE.

[19 TEXAS, 371.]

URBAN HOMESTEAD IS LIMITED AS TO VALUE, BUT NOT AS TO NUMBER OF LOTS which it shall embrace, under the Texas constitution.

HOMESTEAD MAY EXIST IN LOTS NOT CONTIGUOUS to each other, under the constitution of Texas.

HOMESTEAD IN TEXAS MAY INCLUDE OFFICE OR SHOP in which the head of a family pursues his business, though it may be on a lot not contiguous to the family residence, if the entire value does not exceed the statutory limit.

TEMPORARY RENTING OF HOMESTEAD LOTS TO OTHERS is not an abandonment of the homestead.

ERROR to reverse a judgment in an action to try title. The case appears from the opinion.

J. M. Crockett, for the plaintiffs in error.

J. E. Cravens, for the defendant in error.

By Court, HEMPHILL, C. J. This was an action by Stone to try the title to a lot of land in the town of Dallas. The lot had been sold at sheriff's sale as the property of Stone, and the Pryors claimed through that sale. The plaintiff, Stone, had judgment for the lot and for rents, with some reductions, which

were specified. The only important question presented by the record is whether the lot in question was a portion of the homestead of the plaintiff, Stone, and as such exempt from forced sale.

The material facts are, that Stone, with his wife and children, occupied a house and eight lots, which he purchased shortly after his settlement in the town of Dallas, for several years up to the death of his wife, viz., in January, 1855; that Stone, with his children, continued to occupy said house and eight lots for four weeks after the death of his wife; that he then sold the most of his furniture, and rented the house and lots to one C. M. Peak; that his children boarded in the house with Peak's family; that Stone also boarded there, but slept in the house upon the lot which is in controversy. Said last-mentioned house had two rooms, in one of which Stone put his bed and bedding, pictures, carpet, toilet, and all the furniture necessary to fit it up as a bedroom, and which had remained unsold; that the other room was used by Stone as a law-office, and had been so used by him for a year or two, he having purchased the same; that he and children continued to live as above mentioned until about the first of July, 1855, when he left, with his children, for Kentucky; that during his absence the property in controversy was sold under execution; that the house and eight lots rented to Peak, and the property in controversy, was all the real estate owned by Stone in the town of Dallas. It was in evidence that the family portraits, with toilet, etc., were in the bedroom in the house on the lot in suit; that this lot, together with the other eight lots, were worth one thousand six hundred dollars. It was proved that the eight lots upon which plaintiff had been residing during the life-time of his wife were south-east about three blocks from the public square of the town of Dallas, and that the lot in controversy is on the public square, and on the north side.

By the constitution, sec. 22, art. 7, it is declared that the homestead of a family, not to exceed two hundred acres of land (not included in a town or city), or any town or city lots, not to exceed in value two thousand dollars, shall not be subject to forced sale.

From the latter part of this citation, it appears that the limitation of the homestead in the town is not to the number but to the value of the lots. It is not declared that the lots shall adjoin or be contiguous to each other; all that by fair construction of the language is required to entitle the property to

exemption is that the property should be used for the convenience or uses of the head or members of the family. The exemption should not be construed as reserving merely a residence where a family may eat, drink, and sleep, but also a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family. The office of a lawyer or shop of a mechanic is necessary to the convenience and success of their respective profession or trade, but it would frequently be of much inconvenience and detriment that this shop or office should be part of the same building, or even on the same lot with the residence of the family. The exemption is not thus to be restricted in its benefits. It allows any number of lots, not to exceed two thousand dollars, and it cannot be material how many, or how far or how near or remote from each other may be the lots occupied for the convenience of the family and for the prosecution of the business or employment of its head or members: See *Hancock v. Morgan*, 17 Tex. 582; and *Methery v. Walker*, Id. 593.

The exemption would have included the lot had the house been merely an office; but it was more. One room was occupied by the plaintiff as his bedroom, the depository of the family portraits and remaining furniture. To this extent it was his actual residence, and its claim, as such, to exemption cannot be questioned.

The property seems to have belonged to the community goods existing between the plaintiff and his deceased wife, and her heirs have an interest in the same. But the homestead character of the property was not extinguished by the death of the wife. That would remain in its integrity and entirety as against creditors of the survivor, or of the community, and even, it would seem, against the heirs of the wife until division of the community estate; and especially would this be the rule where the heirs of the wife are the children of the marriage, are minors, and with their surviving father constitute the family.

Nor was the exemption lost by the fact of the residence and eight lots being rented. It does not appear that there was any intention to abandon the place as a homestead, or that the renting was for any purpose other than temporary convenience.

It is in proof that the plaintiff with his children left for Kentucky, and though it is not stated that he or they returned, yet this is to be inferred from the record. The property, it is said, was sold during his absence, thus producing the impression that he left on a visit which was temporary, and that he had re-

turned. Of course such absence could not affect the character of the property as a homestead.

We are of opinion that there was no error, and that judgment be affirmed.

Judgment affirmed

HOMESTEAD, WHAT MAY BE EXEMPT AS.—The question as to what may constitute a homestead exempt from execution sale in any state depends, of course, upon the terms of the particular statute creating the exemption. There is, however, in all homestead laws a general similarity upon this point. We propose here to consider the subject in its general aspects, without undertaking a close examination of the provisions of particular statutes.

WHAT TITLE NECESSARY OR SUFFICIENT TO SUPPORT HOMESTEAD.—A homestead right is not an estate in the land, but a mere privilege of exemption from execution of such estate as the holder has: Note to *Poole v. Gerard*, 65 Am. Dec. 483. Upon principle, therefore, there is no reason why the law should concern itself at all with the nature, extent, or value, of the homesteader's estate or interest in the premises. If he has no title, or a defective or limited title, that is his misfortune; but why should that misfortune be increased by depriving him of the privilege of holding such interest as he has free from the claims of creditors? Is there any imaginable reason why a bad title should be liable for the owner's debts where a good title would not be? That the nature or quantum of a debtor's estate in his homestead is immaterial in determining whether it shall be exempt is in accord with what is laid down in the better considered cases. Thus in *Brooks v. Hyde*, 37 Cal. 373, it is said that the debtor's want of title is a "false quantity" in the solution of any question on this point arising between the debtor and his creditors: See also *Spencer v. Geiseman*, Id. 99. In *Watts v. Gordon*, 65 Ala. 546, the court say: "The inferiority, infirmity, or frailty of his interest may, to him and his family [the debtor's], lessen the value of the home in which they dwell, but it cannot injure creditors, from whose demands it may be is thereby withdrawn less of his present property or his future acquisitions." The absurdity of the position that a creditor may defeat his debtor's right of homestead in property on the ground that it is not the debtor's property, and then sell it on execution because it is the debtor's property, is well shown by Mr. Thompson in commenting on the case of *Garaty v. Du Bose*, 5 S. C. 493: Thompson on Homesteads, sec. 166.

It is clearly settled that a debtor need not be the absolute owner in fee in order to establish a homestead right in land, but that it is enough, in general, if he has any estate in fee for life or for years, which may be the subject of sale on execution: Thompson on Homesteads, secs. 165 et seq.; Smyth on Homesteads, secs. 114 et seq.; *Bartholomew v. West*, 2 Dill. 290; *Watts v. Gordon*, 65 Ala. 546; *Deere v. Chapman*, 25 Ill. 610; *Blue v. Blue*, 38 Id. 9; *Conklin v. Foster*, 57 Id. 107; *Potts v. Davenport*, 79 Id. 455; *Pelau v. De Bevard*, 13 Iowa, 53; *Hogan v. Manners*, 23 Kan. 551; S. C., 33 Am. Rep. 199; *Griffin v. Proctor*, 14 Bush, 571; *McKee v. Wilcox*, 11 Mich. 358; *Johnson v. Richardson*, 33 Miss. 462; *McGrath v. St. Clair*, 55 Id. 89; *State v. Diveling*, 66 Mo. 375; *In re Swearinger*, 17 Nat. Bank. Reg. 138. Thus a tenant by curtesy, having a life estate subject to levy and sale on execution, is an "owner" of land within the meaning of the statute allowing to "owners" a homestead: *Potts v. Davenport*, 79 Ill. 455. So a debtor may have a homestead in leasehold property: Thompson on Homesteads, sec. 176; Smyth

on Homesteads, sec. 117; *Watts v. Gordon*, 65 Ala. 546; *Cooklin v. Foster*, 57 Ill. 107; *Pelau v. De Bevard*, 13 Iowa, 53; *Hogan v. Manners*, 23 Kan. 551; S. C., 33 Am. Rep. 199; *In re Swearingin*, 17 Nat. Bank. Reg. 138. So where the debtor has erected a house on land held under a lease which the lessor may terminate at will, the lessee having a right to remove the house: *Watts v. Gordon*, 65 Ala. 546. The debtor's estate may be equitable only, and not legal, and yet he will be entitled to the benefit of the homestead law: Thompson on Homesteads, sec. 170; *Blue v. Blue*, 38 Ill. 9; *Tombin v. Hilyard*, 43 Id. 300; *Hewitt v. Rankin*, 41 Iowa, 35; *Tarrant v. Swain*, 15 Kan. 146; *Moore v. Reaves*, Id. 150; *Orr v. Skraft*, 22 Mich. 260; *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, Id. 107; *Cheatham v. Jones*, 68 N. C. 153; *Morgan v. Stearns*, 41 Vt. 398; *Johason v. May*, 16 Nat. Bank. Reg. 425. Thus there may be a homestead in an equity of redemption: *Cheatham v. Jones*, 68 N. C. 153. So a debtor in possession of land under a contract of purchase, having received no conveyance, may have a homestead therein: *Bartholomew v. West*, 2 Dill. 290; *Blue v. Blue*, 38 Ill. 9; *Fyffe v. Beers*, 18 Iowa, 5; *Stinson v. Richardson*, 44 Id. 373; *Griffin v. Proctor*, 14 Bush, 571; *McKes v. Wilcox*, 11 Mich. 358; *Allen v. Caldwell*, 20 N. W. Rep. 692; *State v. Dieeling*, 66 Mo. 375; *McManus v. Campbell*, 37 Tex. 267. So though the land has not been fully paid for: *Allen v. Caldwell*, *supra*; *McManus v. Campbell*, *supra*. So in case of land purchased from the government and partly or wholly paid for, where the purchaser has received his certificate but no patent: *Allen v. Caldwell*, *supra*; *State v. Dieeling*, 66 Mo. 375. Contrary to the doctrine of these cases, it was held in *Garaty v. Du Bose*, 5 S. C. 493, that one holding land under a contract of purchase could not have a homestead therein, because his interest was not subject to sale on mesne or final process, within the meaning of the constitutional provision relating to homesteads. That case arose on a proceeding against a sheriff for not making the money on an execution by the sale of property held under such a contract, the sheriff having interposed the defense that the debtor had a homestead therein. The court ruled against this defense. The result of the doctrine of this decision would be, as forcibly shown by Mr. Thompson, that an officer, in such a case, would be held liable "for not selling property to which the defendant in the execution had not title which was subject to levy and sale:" Thompson on Homesteads, sec. 166.

Whether mere possession without title is sufficient to support the homestead right has been made a question in a number of cases. Upon principle, as we have already seen, there is no valid reason why a naked possession of land should not give the possessor a right to claim it as his homestead, as against his creditors, unless the statute is express to the contrary. If the debtor's possessory right is of sufficient value to be an object of desire to his creditors, it would certainly seem to be of sufficient value to the debtor himself to entitle him to have it protected under the homestead law. Possession may grow into an absolute title by lapse of time, and is certainly as valuable a right as some inferior interests in realty, which are admitted on all hands to be subject to protection under the homestead act. In any case, indeed, possession is the very thing which the law undertakes to protect by the homestead exemption. The policy of the law is to save the debtor and his family from being deprived by his creditors of the shelter of his homestead roof. The statute says to the creditor that he shall not turn his debtor out of possession of his home. So long as the possession is not disturbed, the value of the homestead as a home is as great where the debtor has no title as if he were

the absolute owner in fee. The law, therefore, should protect the possession, and not concern itself with the title. This would seem to be, at least, the theory of the homestead exemption, independently of any adjudications upon the subject. And in accordance with what is here said, it has been held that a naked possession without any title whatever is sufficient to give the possessor a homestead right against all the world but the true owner: *Spencer v. Geissman*, 37 Cal. 936. On the other hand, it has been determined in other cases that some estate in the premises is essential to constitute one the "owner," so as to be entitled to the benefit of the homestead act: *Charles v. Lamberson*, 63 Am. Dec. 457; *Morgan v. Stearns*, 41 Vt. 398. Hence it is held that a tenant for years whose lease has expired cannot have a homestead in the leased premises: *Brown v. Keller*, 32 Ill. 151. In the same case it was decided that one who had no estate in the land upon which his house was situated could not claim the house as a homestead. The same doctrine is laid down in Dakota in *Myrick v. Bill*, 17 N. W. Rep. 268. Certainly a naked possessor is not to be protected in a homestead right as against the true owner: *Mann v. Rogers*, 35 Cal. 316; *Brooks v. Hyde*, 37 Id. 366; *McClurken v. McClurken*, 46 Ill. 327.

The homestead may be carved out of the separate estate of a husband: *Revalk v. Kraemer*, 68 Am. Dec. 304; or out of land the legal title to which is in the wife, the husband having only an estate by the curtesy: *Boyd v. Cuddeback*, 31 Ill. 113; *Potts v. Davenport*, 79 Id. 455; or of which the wife has the legal and the husband the equitable title: *Orr v. Shraft*, 22 Mich. 260; or out of the separate estate of the wife: *Id.*; *Partee v. Stewart*, 50 Miss. 717; although this is said to be doubtful in California: *Revalk v. Kraemer*, 68 Am. Dec. 304. Where a homestead was sold and the proceeds invested in other land intended to take its place, but by mistake the title was taken to the wife only as a sole trader, and she became bankrupt, it was held that she must be taken to hold the land in trust for the same uses as the original homestead, and that a purchaser of the land at a sale in bankruptcy of her estate, having notice of the facts, took it subject to the same trust: *Murray v. Sells*, 53 Ga. 257. A homestead may also be established upon community property of the husband and wife: *Revalk v. Kraemer*, 68 Am. Dec. 304; *Riley v. Pehl*, 23 Cal. 74; or, in Texas, upon land of which one undivided half is the wife's separate estate, while the other undivided half is, in equity, the husband's separate property: *Willis v. Matthews*, 46 Tex. 478. But neither out of separate property nor out of community property can the husband and wife have more than one homestead: *Thompson on Homesteads*, sec. 225; *Gambette v. Brock*, 41 Cal. 84; *Tourville v. Rierson*, 39 Ill. 447.

The question as to whether or not a homestead can be carved out of land held in joint tenancy or in land held in common is sufficiently discussed in the note to *Wolf v. Fleischacker*, 63 Am. Dec. 122-125. See also *Freeman on Cotenancy and Partition*, sec. 54. The prevailing doctrine is, that a homestead cannot be set apart out of partnership realty: *Kingsley v. Kingsley*, 39 Cal. 665; *Rhodes v. Williams*, 12 Nev. 20; *Terry v. Berry*, 13 Id. 514; *In re Smith*, 2 Hughes, 307; *Short v. McGruder*, 22 Fed. Rep. 46; *Drake v. Moore*, 23 N. W. Rep. 263. Notwithstanding any attempt to create a homestead out of such property, it remains subject to the claims of partnership creditors: *Rhodes v. Williams*, *Short v. McGruder*, *Drake v. Moore*, *supra*. But it seems that where a partner builds a house with partnership funds upon his own lot, with the consent of his copartner, he may constitute it his homestead, the house becoming a part of the realty: *In re Parks*, 9 Nat. Bank. Reg. 272.

POSSESSION AND OCCUPATION OF HOMESTEAD, NECESSITY, NATURE, AND SUFFICIENCY OF.—1. *Possession, Necessity of.*—Possession is unquestionably essential to constitute a homestead, unless the statute expressly dispenses with it: *Mann v. Rogers*, 35 Cal. 316; *McConnaughy v. Baxter*, 55 Ala. 379, overruling *Melton v. Andrews*, 45 Id. 454. There cannot be a homestead in a mere expectancy or remainder which gives no present right of occupancy: *Murchison v. Plyler*, 87 N. C. 79.

2. *Occupancy, Necessity and Sufficiency of.*—Not only must there be possession, but there must also, as a general rule, be occupancy of the premises, for occupancy is of the very essence of a homestead: *Charless v. Lamberson*, 63 Am. Dec. 456, note; *McConnaughy v. Baxter*, 55 Ala. 379; *Williams v. Dorris*, 31 Ark. 466; *Oliver v. Snowden*, 18 Fla. 823; *Solary v. Hewlett*, Id. 756; *Drucker v. Rosenstein*, 19 Id. 191; *Fisher v. Cornell*, 70 Ill. 216; *Neal v. Coe*, 35 Iowa, 407; *Allen v. Chase*, 58 N. H. 419; *Cole v. Laconia etc. Bank*, 59 Id. 53; S. C., Id. 321; *Bowker v. Collins*, 4 Neb. 494; *Morgan v. Stearns*, 41 Vt. 398; *Bunker v. Locke*, 15 Wis. 635. Merely filing a declaration of homestead is of no effect if the land is not occupied: *Oliver v. Snowden*, 18 Fla. 823; *Drucker v. Rosenstein*, 19 Id. 191. If there is no dwelling-house on the land, and it is not occupied or used, nor intended to be occupied or used, as the home of the owner or a part thereof, it cannot be his homestead though he has no other land: *Cole v. Laconia etc. Bank*, 59 N. H. 53; S. C., Id. 321. A mere intent to build or repair and occupy a dwelling-house thereon will not impress it with the character of a homestead if not carried into effect immediately: *Blum v. Carter*, 63 Ala. 240; *Charless v. Lamberson*, 63 Am. Dec. 457; *Williams v. Dorris*, 31 Ark. 466; *Solary v. Hewlett*, 18 Fla. 756; *Barnes v. White*, 53 Tex. 628; *Grosholz v. Newman*, 21 Wall. 481. The rule is thus stated in *Blum v. Carter*, *supra*: "There must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling-house in process of construction. An undefined, floating intention to build or occupy at some future time is not enough. And this intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation of visible character, or by something equivalent to this."

In some cases it has been held, however, that a *bona fide* intent to occupy premises as a homestead, even though not immediately consummated, will be sufficient, if followed by acts of preparation for use, and subsequent early use: *Barnes v. White*, 53 Tex. 628. Thus where the building on the premises was not ready for occupation, but the owner abandoned his home elsewhere and moved his goods into the house, it was held a sufficient setting apart of the homestead from that time, actual occupation having begun as soon as the house was ready: *Neal v. Coe*, 35 Iowa, 407. So where the debtor was moving into the house, having just completed it, at the time an attachment was levied: *Fogg v. Fogg*, 40 N. H. 282. And where a single man, in contemplation of marriage, purchased a city lot, intending to make it his homestead, and afterwards married, and he and his wife began, in good faith, to inclose, improve, and use the lot with the same end in view, it was held sufficient to constitute it a homestead before any house had been erected thereon: *Reske v. Reske*, 51 Mich. 541; S. C., 47 Am. Rep. 594; S. C., 16 N. W. Rep. 895. On the other hand, it was held in *Charless v. Lamberson*, 63 Am. Dec. 457, that an intent of an owner of land to make it his homestead, formed while the Iowa homestead act of 1849 was in force, but not carried into effect until after the repeal of that act, was not sufficient to create it a

homestead. So where the owner of realty moved into a house thereon after a judgment against him, having previously formed the design to make it his homestead, it was held that he could not retain it as such against the judgment: *Bowker v. Collins*, 4 Neb. 494, distinguishing *Fogg v. Fogg*, 40 N. H. 285. And where a declaration of homestead was filed upon unoccupied land, and the owner was proceeding immediately to erect a house thereon, had made a contract therefor, and had hauled a part of the materials on the ground, it was held insufficient to constitute it a homestead as against a debt existing when the declaration was filed: *Drucker v. Rosenstein*, 19 Fla. 191, criticising *Neal v. Coe*, 35 Iowa, 407, and *Barnes v. White*, 53 Tex. 628. So under the Texas statute an intent to make a lot adjoining the owner's home, but separated from it by a small alley, a part of the homestead, followed by the actual erection of a kitchen thereon, after a sale and conveyance of the lot, was held insufficient to constitute it part of the homestead, in a suit for the cancellation of the conveyance, on the ground that the property was homestead property, and the wife of the homesteader had not joined in the conveyance: *Greshols v. Newman*, 21 Wall. 481. "A secret intention of the seller," it was said in that case, could not affect the purchaser. Under some statutes it has been held, contrary to the general rule, that occupation is not necessary to secure a homestead. It was so held, and that possession only was sufficient, under a Tennessee statute, although it was conceded that occupancy was essential under a previous statute: *Dickinson v. Mayor*, 11 Heisk. 515.

3. *Nature of Occupancy*.—The etymology of the word "homestead" shows that it is the place of the home or residence of the owner: Co. Lit. 4, 6; Thompson on Homesteads, sec. 100; *Ackley v. Chamberlain*, 16 Cal. 181; *Gregg v. Bostwick*, 33 Id. 227; *Estate of Delaney*, 37 Id. 176; *Todd v. Gordy*, 28 La. Ann. 666; *Hoitt v. Webb*, 36 N. H. 166; *Philleo v. Smalley*, 23 Tex. 502; *Stanley v. Greenwood*, 24 Id. 224; *Iken v. Olenick*, 42 Id. 195; *Houston etc. R. R. Co. v. Winter*, 44 Id. 597; *Bunker v. Locke*, 15 Wis. 635. Says Mr. Justice Sanderson in *Gregg v. Bostwick*, *supra*: "Homestead, both in the constitution and in the statute, is used in its ordinary or popular sense, or in other words, its legal sense is also its popular sense. It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use and lands used for the purposes thereof." The general rule is, therefore, that the occupation necessary to confer the character of a homestead upon premises, and to entitle them to the protection of the homestead laws, is occupation as a home, residence, or dwelling-place of the debtor and his family: *Charles v. Lamberson*, 63 Am. Dec. 457; *Walters v. People*, 65 Id. 730; *Estate of Delaney*, 37 Cal. 176; *Fisher v. Cornell*, 70 Ill. 216; *Potts v. Davenport*, 79 Id. 455; *Christy v. Dyer*, 14 Iowa, 438; *Cole v. Gill*, Id. 527; *Elston v. Robertson*, 23 Id. 208; *Todd v. Gordy*, 28 La. Ann. 666; *Folsom v. Clark*, 5 Minn. 333; *Tillotson v. Millard*, 7 Id. 513; *Acker v. Trueland*, 56 Miss. 30; *Austin v. Stanley*, 46 N. H. 51; *Allen v. Chase*, 58 Id. 419; *Wiggin v. Buzzell*, Id. 329; *Cole v. Laconia etc. Bank*, 59 Id. 53; S. C., Id. 321; *Wilson v. Cochran*, 31 Tex. 677; *Holliman v. Smith*, 39 Id. 357; *Iken v. Olenick*, 42 Id. 195; *Mills v. Grant*, 36 Vt. 269; *Morgan v. Stearns*, 41 Id. 398; *Bunker v. Locke*, 15 Wis. 635. The premises must be the usual and constant residence, and an owner of a home and usual residence exceeding the statutory value cannot under the Louisiana statute move out of such residence temporarily into a smaller house with intent to make it and the land about it his homestead, and accomplish his purpose: *Todd v. Gordy*, *supra*. A single man who sometimes occupies a house

as a sleeping place, having no servants or family, and who afterwards lets the premises to another, cannot claim them as his homestead: *Wilson v. Cochran*, 31 Tex. 677. The test of residence applies, also, whether the question of homestead arises between debtor and creditor, mortgagor and mortgagee, vender and vendee, or husband and wife: *Estate of Delany*, 37 Cal. 176. In Mississippi the statute provides that to authorize the setting apart of a homestead to the family of a decedent, some member of the family must reside there: *Acher v. Trueland*, 56 Miss. 30. In New Hampshire it is held that under the statute of 1868 children cannot have a homestead in their father's land occupied by him but not by his wife, or his or her family: *Wiggins v. Bussell*, 58 N. H. 329. A married woman may, under the California statute, obtain a homestead by her own occupancy of land never resided on by her husband, it not appearing what were the causes of his absence, or that he had established a home elsewhere, or had any other family than his wife: *Gambette v. Brock*, 41 Cal. 78.

Occupation of premises for business purposes is not ordinarily such occupation as to impress them with the character of a homestead. Hence land occupied only by a grist-mill or saw-mill cannot be a homestead: *Orow v. Whitworth*, 20 Ga. 38; *Greeley v. Scott*, 2 Woods, 657; S. C., 2 Cent. L. J. 361. So, of land occupied only by a shop: *True v. Merrill*, 23 Vt. 672; or by a law office used only as such by a single man: *Stanley v. Greenwood*, 24 Tex. 224. But under the Alabama statute, allowing a homestead for a decedent's family to be set apart out of "other lands," where he occupies no land as a homestead at his death, a lot and storehouse thereon may constitute the family homestead: *Hartfield v. Harcoley*, 71 Ala. 231.

Where part of a building occupied primarily as the owner's dwelling-place is used for business purposes, the authorities speak a various language. The prevailing doctrine is, however, that the fact that a homesteader uses for carrying on business one or more rooms or stories, or additions to a house, or upon a lot occupied as a residence, will not deprive it of its character as a homestead: *Klenk v. Knoble*, 37 Ark. 298; *Gregg v. Boetwick*, 33 Cal. 220; *Hogan v. Manners*, 23 Kan. 551; S. C., 33 Am. Rep. 199; *Orr v. Shraft*, 22 Mich. 280; *Kelly v. Baker*, 10 Minn. 154; *Clark v. Shannon*, 1 Nev. 568; *Hancock v. Morgan*, 17 Tex. 582; *Phelps v. Rooney*, 9 Wis. 70; *In re Tertelling*, 2 Dill. 339. Especially so where there is an express provision to that effect in the statute: *Smith v. Quiggans*, 22 N. W. Rep. 907. Thus part of the building and appurtenances may be used, and even intended to be used, as a brewery: *Klenk v. Knoble*, 37 Ark. 298; *In re Tertelling*, 2 Dill. 339; or as a livery-stable: *Clark v. Shannon*, 1 Nev. 568; or as a physician's office or printing-office: *Kelly v. Baker*, 10 Minn. 154. So, in case of a four-story brick building, one story of which is used for business purposes, though the whole building had the location, appearance, and internal arrangements of a business block: *Phelps v. Rooney*, 9 Wis. 70, Dixon, C. J., dissenting. In that case the court said: "The circumstance that the dwelling was situated on one of the principal streets of the city, or the fact that its external appearance or internal arrangement was like a wholesale or retail store, or because it would be more valuable as a place of business than as a residence, could not affect the question. The case rests upon the fact as to whether the building was really and truly occupied as a dwelling-house for himself and family; if so, they are secured in the enjoyment and use of it as such. This, we think, constitutes a homestead under the statute. Had Rooney seen fit not to use the first story at all, or had he converted it into a dining-hall, or sleeping apartments for boarders, occupying in the mean time the remainder of the building for his dwelling-house, it would probably not be

insisted that his omission to use a part in the one case, or appropriating a portion to the comfort of his boarders in the other, changed the character and condition of the house, and took it out of the operation of the statute." But where a debtor, on the eve of bankruptcy, moved into a business block, not constructed so as to have the appearance of a dwelling-house, it was held that he could not claim it as a homestead: *In re Lammer*, 14 Nat. Bank. Reg. 460. That case arose in the same state as *Phelps v. Rooney*, 9 Wis. 70. In Iowa it is held, contrary to the doctrine of other cases, that where one or more stories of a building are used for business purposes, and the rest as a residence, it must be partitioned horizontally, and only the residence portion protected as a homestead: *Rhodes v. McCormick*, 4 Iowa, 368; S. C., 68 Am. Dec. 663; *Mayfield v. Maasden*, 59 Iowa, 517; S. C., 13 N. W. Rep. 652; *Johnson v. Moser*, 24 Id. 32; except where the statute exempts, up to a certain limit, the part of a building used for carrying on the homesteader's ordinary business: *Smith v. Quiggans*, 22 Id. 907. As to whether or not a homestead exemption will cover a distinct building on the same or an adjacent lot used for business purposes, see *post*.

In several of the cases above cited the parts of the buildings in question used for business purposes were not used entirely by the homesteader himself, but were partly rented to others: *Rhodes v. McCormick*, 4 Iowa, 368; *Mayfield v. Maasden*, 59 Id. 517; S. C., 13 N. W. Rep. 652; *Kelly v. Baker*, 10 Minn. 154; *Phelps v. Rooney*, 9 Wis. 70. The general rule unquestionably is, that buildings rented to others, not servants to the lessor, cannot constitute the lessor's homestead, nor part of it, even though erected on the same lot: *Kaster v. McWilliams*, 41 Ala. 302, approved in *McConnaughy v. Baxter*, 55 Id. 379; *Reck's Estate*, Myrick's Prob. 59; *Kurz v. Brusch*, 13 Iowa, 371; *Hoitt v. Webb*, 36 N. H. 158; *Wade v. Wade*, 9 Bant. 612; *Wilson v. Cochran*, 31 Tex. 677; *True v. Morrill*, 28 Vt. 672; *Schoffen v. Landauer*, 19 N. W. Rep. 95; *Greeley v. Scott*, 2 Woods, 657; S. C., 2 Cent. L. J. 361. So where a double house with distinct entrances (though it may be with a common yard) is partly occupied by the owner, and the other part let to a tenant, only that occupied by the owner can be claimed as his homestead: *Tiernan v. Creditors*, 62 Cal. 286; S. C., 15 Rep. 362; *Dyson v. Sheley*, 11 Mich. 527. But this doctrine, as we have seen, has not been applied in some cases where different stories of a building occupied as a residence have been let to others. Nor does it apply where rooms in a building, occupied primarily as a dwelling, are let to lodgers or boarders; or in other words, where the owner keeps a lodging-house, boarding-house, inn, or hotel in his dwelling: *Ackley v. Chamberlain*, 16 Cal. 181; *Lazell v. Lazell*, 8 Allen, 575; *Mercier v. Chase*, 11 Id. 194; *Goldman v. Clark*, 1 Nev. 607; *Harriman v. Queen Ins. Co.*, 49 Wis. 71. Otherwise where the property is used primarily and chiefly as a hotel, though the owner resides there with his family for the purpose of carrying on the business: *Laughlin v. Wright*, 63 Cal. 113. See, as to whether or not adjacent but disconnected tenements rented to others will be included in the lessor's homestead, the next division of this note. Property occupied only for purposes of religious worship cannot be claimed as a homestead, as in case of a pew in a church: *True v. Morrill*, 28 Vt. 672.

EXTENDING HOMESTEAD RIGHT TO ADJACENT OR NON-CONTIGUOUS PREMISES.—A homestead right no doubt includes whatever lands or appurtenances are connected with the home and convenient for its enjoyment: *Mills v. Grant*, 36 Vt. 269; *Reinbach v. Walter*, 27 Ill. 393; *Gregg v. Bostwick*, 33 Cal. 227; *Greeley v. Scott*, 2 Woods, 657; S. C., 2 Cent. L. J. 361. We have already discussed the question as to how far such right will cover parts of the home-

stead building not in the actual occupancy of the homesteader, or devoted to uses other than those of mere residence and home life; but will it extend to disconnected tenements, or adjacent or non-contiguous lots or tracts, especially where they are rented to others, or applied to purposes not immediately connected with the enjoyment of the home? In a number of cases it has been determined that a homestead exemption will not cover buildings adjacent to the homestead, either upon the same or an adjoining lot, if not in the actual occupancy of the owner, but let to others: *Ashton v. Ingle*, 20 Kan. 670; S. C., 27 Am. Rep. 197; *Kurz v. Brusch*, 13 Iowa, 371; *Hoitt v. Webb*, 36 N. H. 158; *Wade v. Wade*, 9 Baxt. 612; *Schoffen v. Landauer*, 19 N. W. Rep. 95; *Greeley v. Scott*, 2 Woods, 657; S. C., 2 Cent. L. J. 361; but in *Nolan v. Reed*, 38 Tex. 425, it is held that the erection of houses for rent on a homestead lot does not destroy the exemption; and see *Hancock v. Morgan*, 17 Id. 582. So in *Klenk v. Noble*, 37 Ark. 298, it is held that the homesteader may, without affecting his rights, occasionally rent out parts of the premises which he can spare. In Illinois it is held that where a homesteader resides upon his homestead lot, and such lot with the improvements is not above the statutory value, the entire lot is exempt, without regard to the use to which other parts of the lot may be put, as by maintaining a millstone, or the like, thereon: *Hubbell v. Canady*, 58 Ill. 425; *Stevens v. Hollingsworth*, 74 Id. 203. So, under the Nevada statute of 1865: *Smith v. Stewart*, 13 Nev. 65; *contra*, in Wisconsin, *Casselman v. Packard*, 16 Wis. 114. In Vermont a blacksmith-shop on the homestead premises, but separated from the house by a highway, was held to be part of the homestead: *West River Bank v. Gale*, 42 Vt. 27; and in Texas a storehouse on the homestead lot, in which the owner carries on his business, is part of the homestead: *Moore v. Whitis*, 30 Tex. 440. So a mill adjacent to the residence of the mill-owner may be exempt as part of his homestead, under the Florida statute, but not so a farm cultivated as secondary business: *Greeley v. Scott*, 2 Woods, 657; S. C., 2 Cent. L. J. 361. On the other hand, in the same case it is held that a farmer's homestead will not embrace a mill erected on the farm; and in *Mouriquand v. Hart*, 22 Kan. 594, S. C., 31 Am. Rep. 200, a public grist-mill adjoining the owner's farm, but not inclosed with it, was declared to be no part of his homestead. Where the owner of two lots resided on one of them and put up a building covering all the other lot and part of the residence lot, it was held, in Michigan, that the building and the land covered by it constituted no part of the homestead: *Geney v. Maynard*, 44 Mich. 578. The general doctrine is, that a homestead may consist of adjoining lots, blocks, or tracts, used together as part of the homestead: *Andrews v. Hagadon*, 54 Tex. 571; *Arto v. Maydole*, Id. 244; *Englebrecht v. Shade*, 47 Cal. 627; *Gregg v. Bostwick*, 33 Id. 227; *Darby v. Dixon*, 4 Ill. App. 187; *Clark v. Shannon*, 1 Nev. 568; *Bunker v. Locke*, 15 Wis. 635; *Lowell v. Shannon*, 60 Iowa, 713; *Thornton v. Boyden*, 31 Ill. 200. Thus an adjacent vacant lot used for drying clothes, as well as for an approach to the homestead dwelling, may constitute part of the homestead: *Englebrecht v. Shade*, 47 Cal. 627. So, an adjacent block used as an approach to the house, as well as for purposes of ornamentation: *Arto v. Maydole*, 54 Tex. 244. So in case of two lots or tracts farmed together in the same inclosure: *Thornton v. Boyden*, 31 Ill. 200. The question is one of fact, depending upon the intent and the nature of the use: *Arto v. Maydole*, 54 Tex. 244; *Andrews v. Hagadon*, Id. 571; but an adjoining lot to that upon which the homestead residence is, though included in the same inclosure, is no part of the homestead, where the residence lot is worth more than the statutory sum: *Hay v. Baugh*, 77 Ill. 501; *Gardner v. Eberhart*, 81

Id. 316. The homestead need not be circumscribed by fences: *Gregg v. Bostwick*, 33 Cal. 227; and it is held to be no objection that the different parts of the homestead are separated by imaginary lines, or highways, or streams of water: *Darby v. Dixon*, 4 Ill. App. 187; *Clark v. Shannon*, 1 Nev. 568; *West River Bank v. Gale*, 42 Vt. 27; *Bunker v. Locke*, 15 Wis. 635; *Estate of Delaney*, 37 Cal. 176; *Gregg v. Bostwick*, 33 Id. 220; but see *Gardner v. Eberhart*, 82 Ill. 316.

But it is held in some of the cases in which it is admitted that the parts of the homestead may be thus separated, that it must be in one compact body, and cannot consist of non-contiguous tracts or lots: *Bunker v. Locke*, 15 Wis. 635; and in a number of cases it is held that non-contiguous parcels of land cannot constitute one and the same homestead, even though they both contribute to the support of the home: *Walters v. People*, 65 Am. Dec. 730; *Kresia v. Mau*, 15 Minn. 116; *Adams v. Jenkins*, 16 Gray, 146; *Randal v. Elder*, 12 Kan. 257; *True v. Morrill*, 28 Vt. 672; *Mills v. Grant*, 36 Id. 269; as where one of the lots or tracts is used for obtaining fuel for the residence upon the other, or the like: *Walters v. People*, *True v. Morrill*, *Adams v. Jenkins*, *Bunker v. Locke*, *supra*. But the contrary is held under the statutes of a number of the states: *Perkins v. Quigley*, 62 Mo. 498; *Buxton v. Dearborn*, 46 N. H. 43; *Martin v. Hughes*, 67 N. C. 293; *Mayho v. Cotton*, 69 Id. 289; *Hancock v. Morgan*, 17 Tex. 582; *Williams v. Hall*, 33 Id. 212; *Ragland v. Rogers*, 34 Id. 617. In several of these states this is so by virtue of express provisions in the statutes.

The doctrine of the principal case, and of the other Texas cases above cited upon this point, has been modified somewhat by later adjudications. In *Iken v. Olenick*, 42 Tex. 195, it was held that a store on a separate lot several hundred yards away from the residence lot, though contributing by its income to the support of the family, was not part of the homestead; and that though the homestead might consist of one or more lots, they must in fact form part and parcel of the homestead by being connected with or contributing to the comfort of the mansion-house as a home by particular use or appropriation. Respecting the principal case, the court said: "We have been led to discuss the question presented in this case thus elaborately, not by reason of its intrinsic difficulty, or any doubt on our part as to its proper determination, but out of our great respect for the seemingly contrary opinion of the learned and distinguished jurist, who was the first chief justice of this court, as may be inferred from expressions used by him in the case of *Stone v. Pryor*, 19 Tex. 372, and also from the fact that it appears from references to this case, in subsequent opinions of other members of this court, that it seems to have been supposed that the homestead exemption had been held in that case to have a broader scope than we think can be given it: *Moore v. Whitis*, 30 Id. 440; *Williams v. Hall*, 33 Id. 212; *Rogers v. Ragland*, 34 Id. 617; *Clark v. Nolan*, 38 Id. 422. An examination of the case of *Stone v. Pryor* will show, however, that the lot in question in that case was applied, to some extent at least, to homestead purposes. And in most, if not all, of the subsequent cases, though apparently approving the broad rule which seems to be sanctioned by Judge Hemphill, that the lot, if it is necessary to the convenience or success in business of the husband, though entirely disconnected with the homestead, is within the exemption, the facts do not call directly for the decision of the question. It may also be observed that the cases of *Hancock v. Morgan*, 17 Id. 582, and *Methery v. Walker*, Id. 593, which are the only authorities cited in *Stone v. Pryor*, do not support this proposition. In the last of these cases the lot in question was held not to be a part of the homestead, and the first

merely decides that the erection of a new house upon a part of the lot, and a temporary leasing of the old house, after the family had moved from it into the new one, did not exclude that part of the lot upon which the old house was situated from the protection of the homestead exemption, and subject it to the demands of creditors." Speaking upon this subject, Mr. Thompson very tersely remarks that "the doctrine of the early Texas cases, that a man can have a homestead scattered all over a town, regardless of intervening streets, alleys, lots, or blocks, has been exploded in that state, denied in Kansas, and cannot be regarded as sound law anywhere:" Thompson on Homesteads, sec. 117. The present Texas constitution provides that an urban homestead may embrace not only the lot on which the owner's residence is, but that also upon which he "exercises his calling or business," he being the head of a family; and it is held that the lots need not be adjacent: *Miller v. Menke*, 56 Tex. 539; *McDonald v. Campbell*, 57 Id. 413. But under this doctrine, where a druggist lives on one lot, has a drug store on another, and a warehouse on a third, incidentally useful to the drug store for the storage of drugs, it is held that the latter lot is not exempt as being used to exercise the calling or business: *McDonald v. Campbell*, *supra*.

URBAN AND RURAL HOMESTEADS cannot be blended ordinarily, under the Texas statute, and where one owns land in a town and also outside land, if he resides within the town, he cannot claim the outside lands as part of his homestead, and *vice versa*: *Iken v. Olenick*, 42 Tex. 195; *Rogers v. Ragland*, 42 Id. 422; *Evans v. Womack*, 48 Id. 230; *Keith v. Hindman*, 57 Id. 425. The burden of proof in such a case is upon the homesteader to establish any exception in his favor: *Keith v. Hindman*, *supra*. A somewhat similar doctrine is held in other states: *Oliver v. Snowden*, 18 Fla. 823; S. O., 43 Am. Rep. 338; *Sarahas v. Fenlon*, 5 Kan. 592. That the character of a rural homestead is not changed by extending the limits of a town over it without some act on the part of the corporation, see *Taylor v. Bouhware*, 67 Am. Dec. 642, and note; *Finley v. Dietrick*, 12 Iowa, 516; *McDaniel v. Mace*, 47 Id. 509. But where a rural homestead does become urban by being divided into lots, lots retained for purposes of sale and speculation form no part of the homestead: *Clark v. Nolan*, 38 Tex. 416.

The distinction between these two classes of homesteads is important only where there is a difference in the statutory valuation, or in the mode of estimating the extent or value.

ELLIS v. MATHEWS.

[19 TEXAS, 290.]

MERE WEAKNESS OF MIND DOES NOT INCAPACITATE PARTY FROM CONTRACTING, if he be not *non compos mentis*, but it may be a material circumstance in establishing an inference of unfair practice or imposition.

DEED OF GIFT EXECUTED BY AGED WOMAN OF WEAK OR IMBECILE UNDERSTANDING, conveying her whole property to one of her children, must be set aside if there is evidence that any misrepresentation or imposition was practiced upon her.

EVIDENCE OF REPRESENTATION TO AGED AND IMBECILE WOMAN EXECUTING DEED of gift of her whole property to a daughter, made at the time by the daughter's husband in her presence, that the property would not

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be taken out of the mother's possession during her life, is a material circumstance in determining whether the deed was procured by fraud or imposition, where the daughter and her husband sue to recover the property from the mother; and it is error to exclude consideration of it from the jury.

INSTRUCTION WITHDRAWING QUESTION OF FRAUD IN PROCURING DEED FROM IMBECILE woman from the jury, and leaving them to determine solely the question of mental capacity, is error if there is any evidence of fraud or imposition, even though it appears from other parts of the charge that the court did not intend to take the entire consideration of the question of fraud from the jury, unless the error is clearly and completely corrected by the charge as a whole.

APPEAL from a judgment for the plaintiffs in an action to recover certain slaves. The action was brought by Mathews and wife against Mrs. Ellis and her son, on whose farm she lived. The slaves were claimed under a deed of gift of them executed to Mrs. Mathews by Mrs. Ellis, her mother. The defense was that the deed was procured by fraudulently taking advantage of the grantor's age and mental and bodily infirmities. It appeared that at the time of the execution of the deed Mrs. Ellis was seventy-five or eighty years of age, and in feeble health, and that the deed embraced her whole property. The evidence for the defendants tended to show, also, that she was at the time imbecile to such a degree as to be incapable of transacting business, though this was contradicted by the plaintiffs' witnesses. One of the defendants' witnesses, a subscribing witness to the deed, testified that both the plaintiffs were present at the execution of the deed; that when the deed was explained by the witness to Mrs. Ellis to have the effect to take the slaves from her control immediately, she declared she would not sign any instrument which would deprive her of the control of the property during her life, and that the plaintiff Mathews, in his wife's presence, said to Mrs. Ellis that they did not intend to take the property from her control and possession during her life, and she then consented to sign the deed. There was evidence as to Mrs. Ellis's mental and physical condition for several years after the deed was executed, and also as to other matters which it is unnecessary to state. The charge of the court, after stating the effect of the deed if valid, and that it was contested by the defendants as having been obtained by fraud and imposition, when the grantor's mind was so impaired by age, disease, and infirmities that she was incapable of contracting, continued as follows: "Some of the witnesses have spoken of conversation between the parties to the deed of gift,

tending to show that Mrs. Ellis made a verbal reservation of a life estate to herself in the negroes; this you will wholly exclude from your consideration, as no such claim is set up by Mrs. Ellis in her answer. And the only question for your consideration is this: Was Mrs. Ellis, at the time of the making of this deed of gift, of sound mind, and capable of making a binding contract? and if not, did she, by her subsequent acts and conduct, ratify and confirm this deed of gift to her daughter? If you conclude that the execution of this deed of gift was her free and voluntary act, that she was of sound mind when she executed it, capable of making a contract, and uninfluenced by any fraud or deceit by the plaintiffs, then you should find for the plaintiffs. Or if you believe Mrs. Ellis was laboring under such mental imbecility at the time of the execution of the deed of gift as to render her incapable of making a valid contract, or if at the time of its execution she was overreached by the deceit or fraud of the plaintiffs, and that subsequently, when she was of sound mind, and when she was not acting under the influence of fraud or deceit, she freely and fully by her acts recognized the right of the plaintiffs under that deed, then you should find for the plaintiffs." After referring to the evidence of an alleged subsequent ratification, the charge continued: "But if you believe that her mind was so infirm and unsound at the time of the execution of the deed of gift as to disqualify her from understanding what she was doing, or that the plaintiffs overreached her by fraud and deceit, and that she did not afterwards, by her acts or otherwise, ratify the deed of gift, then you should find for the defendants." The defendants excepted, and after verdict and judgment against them, appealed.

Yoakum and Taylor, for the appellants.

R. A. Reeves, for the appellees.

By Court, *WHEELER, J.* If the plaintiffs induced old Mrs. Ellis to sign the deed of gift by declaring that they did not intend to take the slaves out of her possession during her life, thus causing her to believe that she was not to be deprived of their service, and they intended the contrary; can it be doubted that it was a deceit? If it was upon the faith of this representation that she executed the deed, and but for this she would not have signed it, must it not be an act of bad faith afterwards to violate the promise or falsify the representation by dispossessing her? It cannot be said that she ought not to have trusted to the representation. She had a right to repose unre-

served confidence in those standing in so near a relation. Besides, she was old and infirm, and feeble in body and mind. And although the law does not undertake to determine the validity of the acts and contracts of men by the greater or less strength of their understanding, and mere weakness of mind does not incapacitate a party if he be not *non compos mentis*, yet weakness of understanding may be a material circumstance in establishing an inference of unfair practice or imposition. It gives additional force to circumstances leading to the inference that a deed has been obtained by fraud or imposition, or undue influence; for, says Judge Story, "although a contract made by a man of sound mind and fair understanding may not be set aside merely from its being a rash, improvident, or hard bargain, yet if the same contract be made with a person of weak understanding, there does arise a natural inference that it was obtained by fraud, or circumvention, or undue influence:" Story's Eq. Jur., sec. 239. And it is immaterial from what cause such weakness arises, whether it be from temporary illness, constitutional despondency, general mental imbecility, or the natural incapacity of early infancy, or the infirmity of extreme old age: Id. 234, 236; 2 Kent's Com. 451.

When a person, circumstanced as the donor in this case was, makes a deed or does an act by which she deprives herself of all her property, and even of a servant to wait upon her, and renders herself wholly dependent on others for support and every comfort, it can but be regarded as improvident; and when to that is added mental weakness and imbecility, it naturally awakens attention and scrutiny into the means which have caused the act, and gives force to every unfavorable appearance in the case; and if there is evidence that any misrepresentation or imposition has been practiced upon a mind so enfeebled, it would certainly warrant the setting aside the deed on the ground of fraud, arising from imposition and undue confidence or influence. The evidence upon this point was certainly entitled to its weight with the jury in deciding upon the issue of fraud. But they were instructed by the court wholly to disregard what the witness had said of "a conversation between the parties to the deed of gift, tending to show that Mrs. Ellis made a verbal reservation of a life estate to herself in the negroes," as no such claim was set up by Mrs. Ellis in her answer. The evidence was not intended to establish the creation of a life estate by parol, but to show that Mrs. Ellis had made the deed under the belief and expectation that she would not be deprived of the use of the

property during her life, induced by the declarations and promise of the donees, and thus to sustain the defense that it was obtained by deceit and imposition; and in this view, the evidence was proper to be taken into consideration by the jury and given the full weight to which, in their opinion, it was entitled; and it was error to exclude it.

Again: the court instructed the jury that the only question for their consideration was this: "Was Mrs. Ellis, at the time of making this deed of gift, of sound mind, and capable of making a binding contract? and if not, did she, by her subsequent acts and conduct, ratify and confirm this deed of gift to her daughter?" This was virtually withdrawing from the jury the consideration of the question of imposition or fraud, and confining them to the single question of her capacity to contract, or her ratification subsequently of her act. This certainly was error. It is evident, from other portions of the charge, that the court did not intend wholly to exclude from the consideration of the jury the question of fraud. But such was the manifest effect of this portion of the charge; and its tendency as a whole was to divert their minds from that inquiry, and make the case turn mainly on the question of mental incapacity, or the subsequent conduct of the donor, supposed to amount to a ratification of the deed. These were legitimate subjects of inquiry; but they were not the sole or the principal questions for the consideration of the jury. If the effect of this part of the charge had been completely corrected by other instructions, clearly and distinctly submitting to the jury the question of imposition and fraud, this error might have been obviated. But this was not the case. Nor was there anything in the charge which was calculated to have the effect of correcting the error of having withdrawn from the consideration of the jury the representations made to Mrs. Ellis, at the time of executing the deed, to the effect that she should have the use of the property during her life. For these reasons, we are of opinion that the charge of the court was erroneous, and calculated to mislead. The judgment is therefore reversed and the cause remanded.

Reversed and remanded. —

IMBECILITY AS GROUND OF RELIEF AGAINST DEED OR OTHER CONTRACT: See *Hill v. Nash*, 66 Am. Dec. 266, and cases and notes in this series referred to in the note thereto.

ALEXANDER v. KENNEDY.

[19 TEXAS, 488.]

POSSESSION OF ONE CO-HEIR OR CO-TENANT IS POSSESSION OF ALL, as a general rule.

CO-HEIR'S POSSESSION BECOMES ADVERSE TO OTHER CO-HEIRS by acts or declarations repelling the presumption that the possession is in his character as co-heir, and clearly showing a claim of exclusive right; but the hostile intent of the possession must be manifested by more unequivocal acts than are necessary where there is no privity between the parties.

OUSTER OF CO-TENANTS MAY BE INFERRED FROM UNDISTURBED POSSESSION OF ANOTHER CO-TENANT for a great length of time, accompanied by notorious acts of exclusive ownership.

PAYMENT OF TAXES BY CO-HEIR IN POSSESSION DOES NOT ESTABLISH ADVERSE CHARACTER of the possession as against his co-heirs, when standing alone, but is a circumstance which with others will show that fact.

ONE CO-HEIR LEAVING COMMON POSSESSION WITH OTHER CO-HEIRS for more than statutory period, under circumstances excluding the presumption that they intended to claim adversely, or, at least, that he could have reasonably supposed they so intended, will not bar his right under the statute of limitations, although they have paid the taxes for the whole period.

ERROR to reverse a judgment for the defendants in a suit for the partition of certain slaves. The opinion sufficiently states the case.

Mills, for the appellant.

J. A. T. Murray, for the appellees.

By Court, HEMPHILL, C. J. This suit was brought March 14, 1855, for the partition of certain slaves who had been delivered by the defendants, Kennedy and wife, to their daughter, after her intermarriage with Alexander, the plaintiff. The statement of facts, after reciting the delivery of the slaves as above, and their value, continues to the effect that the negroes were taken by Mrs. Alexander to her home, and after remaining there with her and her husband about two years, owing to Mrs. Alexander's health, she and her husband returned with the negroes to defendants, where Mrs. Alexander died in June, 1851, without children. Mr. Alexander left the property in possession of defendants, and they have paid taxes on them ever since, claiming them as their own. The defendants pleaded the statute of limitations.

The court charged, in effect, that if the slaves remained in possession of defendants after the death of their daughter, with the admission on their part of the interest of the plaintiff, the statute of limitations would not begin to run until after a de-

mand and refusal to deliver; but if the jury believed that they had possession for more than two years previous to the institution of this suit, claiming the title and exercising public and notorious acts of ownership over them, their title is complete, and the jury must find for defendants. The jury found for defendants, and the plaintiff has brought up the cause by writ of error.

Mrs. Alexander having died without children, her husband was entitled to one half of the slaves, and the defendants, as father and mother, to the other half, in equal portions. By the statute of distribution, the plaintiff and the defendants were coparceners; and the question is, whether the possession of defendants was so adverse to the plaintiff, he being a co-heir, as to support the plea of limitation. No question has been raised as to whether there should not have been administration on this estate, and whether co-distributees could hold adversely to each other until after the close of administration. Admitting that there was no necessity to administer (there being perhaps no debts, or the debts being paid), and that the rights of the parties, as heirs, could not be disturbed or superseded by a paramount claim under administration, it would seem that the proof in this case was not sufficient to authorize a verdict for defendants.

That the possession of one co-heir or co-tenant is the possession of the other co-heirs, and is taken in trust for their benefit, is an elementary and indisputable principle of law. But this possession may become adverse to the other heirs by acts or declarations repelling the presumption that the possession is in the character of a co-heir, and which show clearly a claim of exclusive right. One tenant in common may disseise, or hold adversely to another tenant in common; but the hostile intent of the possession should be manifested by acts of a more unequivocal character than would be necessary in ordinary cases, where there is no privity of estate between the claimants to the property.

The difference, says Judge Story, between the two cases is, that acts which, if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, susceptible of explanation consistently with the real title. Acts of ownership in tenancies in common are not necessarily acts of disseisin. It depends on the intent with which they are done, and their notoriety. The law does not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established by proof: *Prescott v. Nevers*, 4 Mason, 326-331; see *Corwin v. Davidson*, 9 Cow. 24.

In Pennsylvania it has been held that, to prove a tenant in common has claimed the whole exclusively, it is not necessary to show that he has made an express declaration to that effect. This was stated in *Lodge v. Patterson*, 3 Watts, 74 [27 Am. Dec. 835]. It was said that the hostile intent must be manifested by outward acts of an unequivocal kind; that to constitute a disseisin, it never was held that notice should be sent to the disseisee, or that it must be proved that he had knowledge of the entry and ouster committed on his land.

In the subsequent case of *Hart v. Gregg*, 10 Watts, 185, it was ruled, in effect, that the mere entry of a co-heir into land of the ancestor claiming it all, and taking the rents and profits for twenty-one years (the term of limitation in Pennsylvania), is no disseisin of the other heirs; there must be some plain, decisive, unequivocal act on the part of the heir so entering, amounting to an adverse and wrongful possession in himself, and a disseisin of the others. In this case, there was evidence of facts within the twenty-one years which amounted to a recognition of the rights of the other co-heirs.

In a succeeding case, *Law v. Patterson*, 1 Watts & S. 184, the effect of taking possession by one of the co-heirs, and receiving the profits for his own benefit during twenty-one years, the term of limitation, is learnedly discussed. It is said that to prove a tenant in common has claimed the whole exclusively needs not his express declaration to that effect; for it may be shown as clearly from his acts as from his words. For this purpose, it will be sufficient to show that he took possession of the whole of the land, as if it had been his own exclusively; that he was in the sole and uninterrupted possession for more than the time of limitation; that he received the rents and profits without accounting to his co-heirs for any part thereof, and without any demand having been made by them for such accounting, or evidence of his having acknowledged the claims of his co-tenants.

It seems that the notion once entertained in regard to what was necessary to constitute an actual ouster by a tenant in common has given way, and that an undisturbed and quiet possession for a certain length of time is sufficient ground for the jury to prove an actual ouster: *Milliken v. Brown*, 10 Serg. & R. 188. In Pennsylvania such quiet possession and exclusive claim of the whole for the period of limitation is evidence from which the jury may presume an actual ouster: See last cases cited.

In *Doe v. Prosser*, Cowp. 217, it was said that the possession of one tenant in common, *eo nomine* as tenant in common, can-

not bar his companion, because such possession is not adverse to his right, but in support of the common title, and by paying him his share, he acknowledges him to be his co-tenant. Nor, indeed, is a refusal to pay of itself sufficient without denying his title. But if upon demand of his co-tenant of his moiety the other denies to pay, and denies his title, and continues in possession, such possession is adverse. But in the report of this case by Lord Mansfield, on the rule to show cause why a new trial should not be granted, it is shown that there was no express denial of plaintiff's title by defendant, or refusal to pay him a share of the rents and profits. Nothing appeared except that one tenant in common had been in possession for thirty-six years, without claim or demand under the other tenant in common; that no actual ouster was proved. The court instructed the jury that they were warranted, from the mere length of time, to presume that the possession was adverse. His lordship continued to be of the same opinion, that some ambiguity had arisen from the term "actual ouster," as if it meant some act accompanied with real force, and as if turning out by the shoulders were necessary. But that was not so. A man may come in by rightful possession, and yet hold over adversely without title. If he does, such holding over, under circumstances, would be equivalent to an actual ouster: *Angell on Limitations*, 460.

In the above case, the co-tenant had held for sixteen years longer than the term of limitation under the statute of 21 James I. The current of authorities is in support of the doctrine as laid down in the above case of *Doe v. Prosser*, Cowp. 217; viz., that mere possession of a tenant in common for a great length of time would be evidence on which a jury may presume an actual ouster: *Parker v. Proprietors etc.*, 8 Met. 100 [37 Am. Dec. 121]; *Jackson v. Whitbeck*, 6 Cow. 632; *Chambers v. Pleak*, 6 Dana, 432 [32 Am. Dec. 78]. In Pennsylvania it seems well established from the cases cited that the sole, undisturbed possession of one tenant in common, receiving the rents and profits for himself, without recognition of the claim of his co-tenants, will be evidence from which an ouster may be presumed. In the case of *Law v. Patterson*, 1 Watts & S. 184, in which this rule was distinctly affirmed, the acts of ownership by the tenant in common in possession were very unequivocal; such as, for instance, leasing the land in his own name and receiving the rents for twenty-three years, without any claim by the other tenant in common, erecting a dwelling-house and

other improvements, paying the taxes, and even paying the purchase money for the land.

If the mere possession by a co-heir or co-tenant, with the exercise of notorious acts of exclusive ownership for the period of limitation, be a circumstance from which ouster may be presumed, the inference of adverse possession and ouster is very strong against the plaintiff in this case from the fact that nearly twice the statutory term of limitation had intervened prior to the bringing of suit. But in this case, the evidence of exclusive claim is not satisfactory. The suit proceeds on the supposition that the slaves had been the property of the wife. In consequence of her ill health, she and husband returned with the negroes to her father's house, where she died. The negroes were in the possession and under the control of the husband during the life of the wife, and at her death, he being already in possession, being also a co-heir with defendants and entitled to administration, was the better entitled to remain in possession. But it is said he left them in possession of defendants. If this means that he abandoned the possession, he was, of course, precluded at the end of the two years. But if it mean that he, having the best right, or even an equal right, left them with his co-heirs—and this is the more rational interpretation of the language—it seems that there was a superadded confidence and trust reposed, in addition to that arising by operation of law from the capacity of defendants as co-heirs.

Again: the acts of ownership of the co-heir, viz., those which show the possession to be in an exclusive right, must be very unequivocal. Here there is positively evidence of no act except the payment of taxes upon the slaves, claiming them as their own. This is not sufficient. It is a circumstance which, with others, will show the possession adverse. But the mere fact that one co-heir pays the taxes will not ripen by length of time into title to the property. If there had been evidence to authorize the charge of the court, which was upon the presumption that there had been public and notorious acts of ownership on the part of the defendants, the judgment must have been sustained. But there seems to have been no other act except the payment of taxes; and if the property was left by plaintiff with defendants, under circumstances (as seems probable from the language of the statement of facts) which would exclude the presumption that the defendants intended to claim exclusively, or at least, that the plaintiff could have reasonably imagined that they would set up such pretension, then certainly

the evidence was not sufficient to warrant the jury in finding their verdict.

To prevent misapprehension, it may be observed that there are many acts by a tenant in common which will immediately give currency to the statute of limitations; as, for instance, a purchaser from a tenant in common entering under a recorded deed, or notoriously claiming the whole of the property, and other acts so hostile and repugnant to the claim of other co-heirs as to show the possession to be not as co-heir, but in an adverse right: *Cryer v. Andrews*, 11 Tex. 170; *Portis v. Hill*, 8 Id. 273.

Upon the whole, though the neglect of the plaintiff to claim an account and division for nearly four years is a presumption of abandonment of his rights, yet as the property was left by him with those who might in a certain sense be regarded as standing in the relation of parents, and there being no evidence of any such acts of ownership as would by reasonable diligence apprise him of there being an adverse claim, and as the defendants did not take the possession, but they came into it by the voluntary act of plaintiff, reposing, as we must suppose, a high degree of trust and confidence in their fidelity, and just regard to his rights, we must hold the verdict unwarranted by the evidence; and the judgment is therefore reversed and cause remanded.

Reversed and remanded. —

POSSESSION OF TENANT IN COMMON, WHEN ADVERSE TO CO-TENANTS, AND WHEN NOT: See *Phillips v. Gregg*, 36 Am. Dec. 158; *Hart v. Gregg*, Id. 166; *Watson v. Gregg*, Id. 176; *Grafton v. Tottenham*, 37 Id. 472; *Parker v. Proprietors*, Id. 121; *Bolton v. Hamilton*, Id. 509; *Robertson v. Robertson*, 38 Id. 148; *Colburn v. Mason*, 43 Id. 292; *Meredith v. Andres*, 45 Id. 504; *Harmon v. James*, Id. 296; *Jones v. Weatherbee*, 51 Id. 653; *Thompson v. Mauchinney*, 52 Id. 176; *Marcy v. Stone*, 54 Id. 736; *Young v. Adams*, 58 Id. 164; *Peck v. Carpenter*, 66 Id. 477; *Gosse v. Donaldson*, 68 Id. 723, and notes. To the point that the possession of one co-heir inures *prima facie* to the benefit of all; that he cannot avail himself of the statute of limitations as against his co-heirs, unless his possession is openly adverse, and that mere acts of ownership are not sufficient, the principal case is cited in *Gilkey v. Peeler*, 22 Tex. 669.

WHEELER v. HOLLIS.

[19 TEXAS, 522.]

OMISSION IN STATEMENT OF FACTS ON APPEAL OF IMPORTANT DOCUMENT, leaving it uncertain what the evidence was below, will not preclude a revision of the judgment, where the opinion of the appellate court proceeds on grounds which render the missing evidence immaterial.

SUCCESSION TO PERSONALTY IS GOVERNED BY LAW OF DOMICILE of the owner at the time of his death.

GUARDIAN MAY CHANGE WARD'S DOMICILE BY ABSCONDING TO DEFRAND CREDITORS, leaving his guardianship unsettled, he being the step-father of the ward, and the ward being a member of his family, if there is no fraud as against the ward.

APPEAL from a judgment for the plaintiff in an action to recover certain slaves. It appeared that the slaves were formerly the property of one Elizabeth Hamilton, who died intestate, under age, and unmarried, in Arkansas. She formerly resided in Mississippi, with her mother and her step-father, one Watson, who was her guardian. Watson removed with his family, including his ward, from Mississippi to Texas. There was evidence tending to show that he left Mississippi to avoid paying his debts. It seems, also, to have been proved that he left his guardianship accounts unsettled. A record of the probate court of the proper county, being his inventory as guardian, was introduced in evidence below, but was omitted from the statement on appeal. A few years after settling in Texas, Watson removed to Arkansas to escape the payment of his debts. His ward died there, and his wife, the mother of his ward, died a few years afterwards, either in Texas or Arkansas. Watson returned to Texas, and sold the slaves in question to the defendant. The plaintiff claimed them as guardian of the half-brother and sisters of Elizabeth, the children of Watson. The question was, whether the laws of Mississippi or those of Arkansas should govern the succession of the property in question. If the former governed, the plaintiff must recover; if the latter, the defendant must recover. The case turned upon the question whether the guardian could effect a change of domicile of the ward by leaving Mississippi as he did. The charge of the court was in favor of the plaintiff. The purport of it is sufficiently stated in the opinion. The plaintiff having recovered judgment, the defendant appealed.

O. M. Roberts, for the appellant.

Henderson and Jones, for the appellee.

By Court, **WHEELER, J.** It is objected, on behalf of the appellee, that the appellant is not entitled to a revision of the judgment on the merits, because the statement of facts is imperfect. It however appears by the statement of facts what the missing document was; and in the view we entertain of the main question in the case, nothing which it could contain—being but an inventory rendered to the court in Mississippi by the defendant's vendor as guardian—could possibly have any influ-

ence upon the decision of the case. If it were uncertain what the evidence was, and we could not certainly know that its presence in the statement of facts would not affect our opinion of the case, the objection would be entitled to weight. But as our opinion proceeds on grounds which render the evidence immaterial, giving the appellee the benefit of everything it can be supposed to contain, we do not think its loss should deprive the appellant of the right to have the judgment revised.

The main question in the case is, whether the removal of Watson and wife, with his ward, Elizabeth Hamilton, from Mississippi to Texas, and hence to Arkansas, effected a change of the domicile of the ward; for it is not questioned, and is undeniable, that the law of her domicile at the time of her death must regulate the succession to her personal property. Judge Story, in his *Conflict of Laws*, has examined the authorities on the question whether a guardian has the power to change the domicile of his ward from one country to another, so as to change the rule of succession to his personal property in case of his death, at some length; and from his citations, it appears that, while there is a difference of opinion among foreign jurists, the weight of authority is in favor of the power, if the change was without fraud. There certainly is a great weight of authority in favor of such a power in the parent; though some foreign jurists take a distinction between the case of a change of domicile by a parent and by a guardian, and while they admit the right in the former, deny it to the latter: Story's *Confl. L.*, secs. 505-507, and notes. "The same question," says Judge Story, "has occurred in England; and it was on that occasion held that a guardian may change the domicile of his ward so as to affect the right of succession, if it is done *bona fide* and without fraud:" *Id.*, sec. 506. The case referred to is *Pottinger v. Wightman*, 3 Meriv. 67, decided by Sir William Grant. The case was one of the first impression, it seems, at that time, in England. It was argued with great learning by Sir Samuel Romilly and Mr. Swanston in favor of the power of the guardian, who was the mother, a widow, acting *sui juris* and for her children; and her power of effecting a change of domicile was sustained. From the opinion of the master of the rolls, however, it may be plainly inferred that if it had appeared that it was with a fraudulent view to the succession of her children and wards that the guardian had changed her abode, the decision in that case would have been different. (See this case referred to by Lord Campbell in the house of lords in *Johnstone v. Beattie*, 10 Cl. & Fin. 138; and see the opinion of Lord Cotten-

ham, to the effect that an infant may be taken out of the limits of the jurisdiction by permission of the court of chancery: *Id.* 106, same case.) Judge Story says the doctrine of the case of *Pottinger v. Wightman*, 8 Meriv. 67, has been recognized as the true doctrine in America. Nevertheless, he questions the power of the guardian: *Story's Conf. L.*, sec. 506, and notes.

It is to be regretted that the question is left by the authorities in so much doubt and uncertainty. The opinions of American courts, as far as we have seen, appear to favor the power of the guardian, though the cases are not precisely in point to the present: *Holyoke v. Haskins*, 5 Pick. 20 [16 Am. Dec. 372]; *Cutts v. Haskins*, 9 Mass. 543; *Guier v. O'Daniel*, 1 Binn. 349, in note; *Upton v. Northbridge*, 15 Mass. 239. We will conclude our examination of authorities by reference to the opinion of Chief Justice Gibson in *School Directors v. James*, 2 Watts & S. 568 [37 Am. Dec. 525]. He considers the civilians equally divided upon the question whether a guardian or tutor stands in the place of a parent, and has the same power as a father or mother, *sui juris*, to change the domicile of a child; and concludes that the English and American authorities support the affirmative, and would be amply sufficient to turn the scale of authority, "were it not for the powerful doubt thrown in on the other side by Mr. Justice Story." He thinks there are grounds for this doubt, and reasons thus: "No infant who has a parent *sui juris* can in the nature of things have a separate domicile. This springs from the *status* of marriage, which gives rise to the institutions of families, the foundation of all the domestic happiness and virtue in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom and as a part of their parents' family; without which the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community, therefore, they are an integral part of the domestic economy; and the family continues for a time to have a local habitation and a name after its surviving parent's death. The parent's domicile, therefore, is consequently and unavoidably the domicile of the child. But a ward is not naturally or necessarily a part of his guardian's family; and though the guardian may appoint the place of the ward's residence, it may be and usually is a place distinct from his own. When an infant has no parent, the law remits him to his domicile of origin, or to the last domicile of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian, when a

change of the infant's domicile is not necessary to the accomplishment of any one purpose of the guardianship?" But waiving the decision of the question, and granting the guardian may, for some purposes, change the ward's domicile, the judge says, applying the law to the case then before the court: "Yet if he may not exercise the power purposely to disappoint those who would take the property by a particular rule of succession (and nearly all agree that even a parent cannot), how can he be allowed to exercise it so as obviously and unavoidably to injure the ward himself?" And it was on the ground here suggested that the decision turned.

Where an infant has no parent—the case supposed by the judge—there may be much force in the reasoning; and there certainly is great justice in the sentiment and force in the argument in support of the authority of the parent. But may not the same reasoning be applied, and with equal propriety and force, to support the right of the surviving mother who has married the second time, especially where the nurture and education of a daughter is concerned? Should her marrying again deprive her of the right to have the custody, care, and supervision of the education of her infant children, or them of maternal sustenance and protection? Is it the less indispensable (in the very appropriate language of the learned judge) that the infant children, daughters especially, be brought up in the bosom and as part of the family of which the mother is one of the united head, without which she could not perform the duty she owes them, or receive from them the homage to which she is entitled? Maternal care and instruction are not the less her duty and their right in consequence of her second marriage. They are no less a part of the domestic economy, and equally entitled to membership in her family. There can be no reason why her domicile, the domicile of her choice, should not be theirs, if she and her husband unite in making it such. When an infant has no parent, the law, it is true, remits him to his domicile of origin, or to the last domicile of his parent. But when he has a surviving mother, it is difficult to perceive the justice or propriety there would be in not permitting her to make her domicile that of her children. It may be different to some extent in European society, but in the society of this country, the habits and sentiments of our people, our ideas of domestic economy, would be opposed to denying the mother, upon her second marriage, the custody of her infant children. In older communities, it may not be unusual for children who

have parents to have others appointed their guardians; and then it may be truly said that the ward is not naturally or necessarily a part of the guardian's family; and so it may be said where the ward has no parent. But in this country, it cannot be said, I apprehend, in general, where the ward has a mother whose husband is the guardian of her child. There may be cogent reasons why, for the benefit of her ward, the mother may wish to change her abode and that of her ward. Immigration here from our older sister states is the natural order of things; and mothers, who have married a second time may have as good reasons for changing the domicile of their children for their mutual advantage as others. If they, or their husbands, are the guardians of their children, it is difficult to assign any reason in support of the right of parents to change the domicile of their children which would not apply to them, where for the mutual advantage of both parties they desired the change. It is admitted that a widow, *sui juris*, may change the domicile of her children, she being their guardian. If she should marry after making the change of domicile, the law would not remit the children to her former domicile. Then why should their domicile be unalterably fixed by the fact of her marriage, when she may marry with a view to the same change of her place of abode which she would have effected had she remained a widow?

There may be more reason to deny the right of a guardian to change the domicile of his ward in governments which deny the right and power of expatriation, and the obligation of allegiance is held to be perpetual, than in this country, where the right of expatriation is admitted. There doubtless is good reason and sound policy in requiring that the change be made *bona fide* and without fraud; and holding the change ineffectual, where the guardian should change the domicile of a child who was sick, with no other apparent object than that of removing him from a place in which, according to the law of succession, the guardian would not succeed to the child's estate, to another place which admitted the guardian to such succession. Such a removal may be justly deemed a fraud upon those who would have succeeded, if no removal had taken place. So if the removal be purposely to the detriment of the interest of the ward, or to enable the guardian to incumber or convert to his own use the property of his ward, it may be deemed fraudulent as to the ward himself, and may justly be held not to effect a change of his domicile. And to this effect, the case of the *School Directors v. James*, 2 Watts & S. 572 [37 Am. Dec. 525],

in which the opinion of Chief Justice Gibson (from which I have quoted at so much length) was delivered, is a strong authority. The court maintain decidedly that whatever may be the power of the guardian over the person and property of the ward, he cannot exercise it so as to injure the ward himself. The very end and purpose of his office is protection, and there is no imaginable case, the court say, in which the law makes it an instrument of injury by implication. Where the guardian acts fairly and within the scope of his authority, the ward must bear the consequences, because he must bear those risks that are incident to the management of his affairs; but that is a different thing from burdening him with a loss as a legal consequence of the relation. And accordingly it was held, in a suit free from fraud, that the guardian could not change the domicile, so as to subject the property of the ward to liability for taxation in the domicile of the guardian. If the law will not permit the office of guardian to become the instrument of injury by any possible legal consequence or implication, much less will it by the intentionally wrongful, fraudulent, or unauthorized act of the guardian. He can acquire no right by such fraudulent or unauthorized act.

But the charge of the court made the removal of the guardian from the state of Mississippi to avoid the payment of his own debts, coupled with the fact of his failure to settle his guardianship with the probate court before his removal, such a fraud, *per se*, as to prevent a change of the domicile of his ward. And the effect of this charge cannot be said to have been effaced by the instruction given at the instance of the defendant, with the subjoined qualification. The jury were still left at liberty to find that there was no change of domicile in contemplation of law, if the guardian left Mississippi to avoid the payment of his debts, and without settling with the probate court; or if there were "other facts going to show a wrongful intent," without being informed in what the wrongful intent must consist, otherwise than as they might deduce it from the preceding portions of the charge, which, taken altogether, was not quite consistent. The jury would very naturally infer from the charge that if the guardian had acted in fraud of his own creditors, in effecting a change of domicile, they might find that the domicile of the ward was not changed by the removal, although the conduct of the guardian may not have been fraudulent as to those entitled to succeed to the property of the ward in case of her death, or fraudulent or injurious in relation to the ward herself. As

there was evidence from which the inference might be very readily drawn that the guardian had acted fraudulently as to his creditors, the charge of the court in this respect was calculated to mislead. Its tendency as a whole, we think, was to mislead upon this point; and for that reason it must be held to be erroneous. The failure to account, as guardian, to the court in Mississippi, was a circumstance which might be looked to in connection with others to ascertain the purpose of the guardian; so might his after management and dealing with the property of his ward; but his failure to give an account in Mississippi of his guardianship cannot be deemed conclusive evidence of a change of domicile purposely to defraud those entitled to the succession, or that in its consequences it was intentionally or necessarily injurious to the ward herself. Although it may be true that the guardian left Mississippi to avoid the payment of his debts, that could not be otherwise material than as showing that the primary object he had in view was not the benefit of his ward. It does not follow that there was an intention to defraud her, or those who might succeed to her rights of property, or that the removal was injurious to her. That fact, and the circumstance of the failure of the guardian to account, were not sufficient, in themselves, to prevent a change of the ward's domicile; yet the charge of the court was calculated to induce that belief on the part of the jury; and as it may have been the cause of their verdict, the judgment must be reversed and the cause remanded.

Reversed and remanded.

ROBERTS, J., did not sit in this case.

SUCCESSION TO PERSONALTY IS GOVERNED BY LAW OF DECEDENT'S DOMICILE AT DEATH: *McCullom v. Smith*, 33 Am. Dec. 147; *Gravillon v. Richards's Ex'r*, Id. 563; *Goodall v. Marshall*, 35 Id. 472; *Vroom v. Van Horne*, 42 Id. 94; *Lawrence v. Kittridge*, 56 Id. 385; *Hairston v. Hairston*, 61 Id. 530, and notes thereto.

GUARDIAN'S CONTROL OVER DOMICILE OF WARD: See *School Directors v. James*, 37 Am. Dec. 525; *Hiestand v. Kuns*, 46 Id. 481; *Grimmett v. Witherington*, 63 Id. 66, and notes. The principal case is cited upon the point as to changing the domicile of a minor to change the law of succession as to his property, in *Trammell v. Trammell*, 20 Tex. 417.

SILVAN v. COFFEE.

[20 TEXAS, 4.]

FORGED EXECUTION IS VOID, AND NO TITLE CAN BE ACQUIRED UNDER IT BY AN INNOCENT PURCHASER WITHOUT NOTICE.

INSTRUCTION WHICH PRECLUDES JURY FROM INQUIRING INTO FACT OF FORGED EXECUTION IS ERRONEOUS. Proof that defendant had knowledge of or was concerned in the commission of the forgery makes no difference. A forged execution is absolutely void, and not merely voidable.

THE facts are stated in the opinion.

Chandler and Turner, for the appellant.

S. Ford, for the appellee.

By Court, HEMPHILL, C. J. This was a suit to recover town lots, which the defendant, Coffee, claimed under a sheriff's sale upon an execution issued on a judgment rendered by a justice of the peace.

The case was before this court at a previous term, *sub nom. Coffee v. Silvan*, 15 Tex. 354, and having been remanded, the plaintiff by amendment charged that the execution was a forgery.

He attempted to support this by evidence, and asked an instruction to the effect that if the jury from the evidence believed the execution to be a forgery, and not issued by the justice or his authority, they should find for the plaintiff. This was given with the qualification, "that if defendant was concerned in the perpetration of such forgery, or had notice of the same when he purchased."

This is believed to be erroneous. The question was not of an irregularity which would make the execution voidable, but which would not affect a purchaser unless it had taken place with his knowledge or participation; but was in relation to a fact which would make the execution absolutely void.

If the execution were forged, it was void, and no title could be acquired under it by the purchaser.

The evidence was conflicting, or threw some degree of doubt over the point at issue, though very possibly the jury would without the instruction have found for the defendant, believing, as they might have done from the evidence, that the execution was not forged.

But the instruction had the effect of precluding the jury from inquiring into the fact of forgery, unless it were also proved that the defendant had knowledge of or was concerned in the commission of the forgery.

This was an error of such character as to require the reversal of the judgment, and it is accordingly reversed and the cause remanded.

Reversed and remanded. —

SALE OF LAND UNDER VOID EXECUTION IS VOID: *Walker v. Marshall*, 43 Am. Dec. 502. But an irregular execution is not void, but voidable only: *Sydnor v. Roberts*, 65 Id. 84, and note thereto 95. And a purchaser at sale under a voidable execution will be protected: *Mitchell v. Evans*, 37 Id. 169; *Ingram v. Belk*, 47 Id. 591. A sale under execution which is voidable only, but not void, is valid, even when made to a purchaser with notice of the fact, where there is no fraud: *Mace v. Dutton*, 52 Id. 510.

SHEPHERD v. CASSIDAY.

[20 TEXAS, 24.]

OLD DOMICILE CANNOT BE FORFEITED without conclusive proof that a new one has been acquired.

IF OLD HOMESTEAD CAN BE LOST without proof that a new one has been gained, the circumstances to show abandonment must be most clear and decisive.

HOMESTEAD CANNOT BE LOST BY MERE ABSENCE of the party or family intended to be benefited.

RIGHT TO HOMESTEAD EXEMPTION CANNOT BE REGARDED AS FORFEITED, except by clear intention of total abandonment.

INTENTION TO ABANDON HOMESTEAD MAY BE CHANGED any time before a new one is acquired; and however such change is made known, it will be effectual to protect homestead rights.

CONTINUOUS ABANDONMENT OF HOMESTEAD, up to the time that some opposing right has, by sale, become vested in other parties, must be shown in order that it may be declared forfeited.

SUIT to recover a house and lot, alleged to be a homestead. The opinion states the facts.

C. C. and A. D. McGinnis, for the appellant.

Campbell and Smith, for the appellee.

By Court, HEMPHILL, C. J. The object of the present suit is to recover a lot of land in the town of Bastrop, claimed by the plaintiff, Margaret Cassiday, as her homestead, and damages for its detention. The defendant, James W. Shepherd, claims that the plaintiff had abandoned her homestead, and that he purchased the lot at sheriff's sale.

The plaintiff left Bastrop on or about April, 1855, and the lot was sold in October of the same year, the plaintiff in the mean time living with her children in Austin, where she has ever

since continued to live, but has acquired no homestead. There was proof of declarations of her intentions as to retaining or abandoning her homestead. The judgment was for the plaintiff, and the defendant appealed.

The question of abandonment of homestead, or by what acts and circumstances a person who has a homestead forfeits his right to the exemption before or without acquiring a new homestead, presents great difficulty in its adjudication. The rules in relation to domicile, the abandonment of the old and the acquisition of a new domicile, are not (if it be admitted that mere abandonment will forfeit the homestead right) altogether applicable. For it is a maxim that every man must have a domicile somewhere, and also that he can have but one; that his existing domicile continues until he can acquire another; and that by acquiring a new domicile he relinquishes his former one. The more correct principle, says Judge Story, is that the original domicile is not gone until a new one is actually acquired *facto et animo*: Story's Conf. L., sec. 47; *Jennison v. Hapgood*, 10 Pick. 77; *Thorndyke v. City of Boston*, 1 Met. 242; *Sears v. City of Boston*, Id. 250.

If we admit that an old homestead may, in opposition to this rule with regard to the change of domicile, be abandoned before the acquisition of a new one, it can only be on the most clear and conclusive facts of abandonment of the homestead with an intention not to return. An old domicile cannot be forfeited without conclusive proof that a new one has been acquired. If an old homestead can be lost without proof that a new one has been gained, certainly the circumstances to show abandonment must be most clear and decisive.

We do not intend to assert the proposition that the old homestead remains until a new one is gained. This would, perhaps, too much embarrass and obscure the condition and rights of property to receive judicial sanction, there being no law or statute to that effect. But while this is admitted, we must remember the wise and beneficent purposes of the homestead exemption: that it was intended to secure the peace, repose, independence, and subsistence of citizens and families; that it was placed beyond the reach of creditors, an asylum upon which they might gaze, but which they could neither enter nor disturb; a right so strongly secured, founded upon such high public policy, cannot be lost by the mere absence of the party or family intended to be benefited. The homestead is not to be regarded as a species of prison bounds, which the owner cannot pass over without pains

and penalties. His necessities or circumstances may frequently require him to leave his homestead for a greater or less period of time. He may leave on visits of business or pleasure; for the education of his children; or to acquire in some more favorable location means to improve his homestead; or for the subsistence of his family; or he may intend to abandon, provided he can sell. But let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited. And if he did intend on leaving to abandon, this may be changed by him up to the time that he acquires a new homestead. He may show this change by the resumption of his residence, or it may be made known in other modes; and however it may be made known or ascertained, it will be effectual to protect his right; for if the place be in fact his homestead, it cannot be exposed to forced sale. Frauds will not be permitted; but the right to the homestead cannot be forfeited unless by a party's showing a continuous abandonment up to the time that some opposing right by sale has vested legally in other parties.

The law of the case was fully expounded to the jury. There was no error in the charge, at least none of which the appellant could complain. We are satisfied with the finding of the jury. They were acquainted with the parties, and were the judges of the weight to be given to the petulant observations of this old lady, made, some of them at least, when she was in very bad humor. They found, and we think properly, that she had not abandoned her homestead, and the judgment is affirmed.

Judgment affirmed.

OLD DOMICILE IS RETAINED UNTIL NEW ONE IS ACQUIRED: *Ringgold v. Barley*, 59 Am. Dec. 107, and note 113, and cases there collected; *Lowry v. Bradley*, 39 Id. 142, and note.

ABANDONMENT OF HOMESTEAD: See *Franklin v. Coffee*, ante, p. 292; *Stewart v. Mackey*, 67 Am. Dec. 609; *Taylor v. Boulware*, Id. 642; *Watters v. People*, 65 Id. 730; and note to *Taylor v. Hargous*, 60 Id. 610, where the subject is discussed at length.

THE PRINCIPAL CASE IS CITED in *Hamblin v. Warnecke*, 31 Tex. 94, to the point that mere absence from a homestead without acquiring a new one will not constitute an abandonment so as to give a court jurisdiction to order the forced sale of it. In *McMillan v. Warner*, 38 Id. 413, to the point that a homestead may be abandoned without the acquisition of a new one; and in *Woolfolk v. Rickets*, 41 Id. 362, to the point that intention to abandon a homestead may be changed up to the time a new one is acquired.

HOPKINS v. UPSHUR.

[20 TEXAS, 89.]

VOLUNTARY SUBSCRIPTION TO DONATE CASH OR PROPERTY TO VESTRY OF CHURCH as trustees of the temporal affairs of the church for the erection of a church building, and delivered to one of said vestry, ripens into an enforceable contract as soon as the trustees are permitted to incur legal liabilities and expense upon the faith of it.

ANY CHOSE IN ACTION MAY BE ASSIGNED IN TEXAS, and suit brought thereon by an equitable holder.

SUBSCRIPTION FOR PURPOSE OF ERECTING CHURCH BUILDING MAY BE ASSIGNED by the vestry in payment therefor; and the contractor who undertakes to build the church, and to whom the subscription has been assigned, may sustain an action therefor in his own name.

COURT OF EQUITY HAS POWER TO ENFORCE SUBSCRIPTION FOR CHARITABLE PURPOSES by virtue of its general jurisdiction, independent of a statute.

The facts are stated in the opinion.

R. T. Brownrigg, for the appellant.

West, for the appellee.

By Court, **ROBERTS, J.** Appellant recovered a judgment against appellee for fifty dollars, in a suit before a justice of the peace. It was carried into the district court by *certiorari*, and the cause, having been submitted to the judge, was decided against appellant. From this decision the appeal was taken to this court, and the question now is, Did the court decide correctly in determining that the facts adduced on the trial did not show a good cause of action in plaintiff below?

The statement of facts shows that Upshur signed a subscription, which reads as follows:

“AUSTIN, March 17, 1851.

“ We, the undersigned, agree to donate the cash or property set opposite our names for the purpose of erecting a Protestant Episcopal church in the city of Austin. [Among others]

H. L. Upshur.....cash.....\$50.”

It is contended by Upshur that Hopkins cannot make this instrument the foundation of a cause of action against him, because: 1. It is wanting in proper parties, to wit, a payee; 2. It is wanting in mutuality, if there were payees to it; 3. It is wanting in a valid consideration.

Standing by itself, isolated from the attendant and subsequent transactions in relation to it, it would clearly be liable to these objections. It does not bear upon its face all the qualities of a good cause of action, as does a promissory note in ordinary form: The facts, as shown in the record, were that this subscription

was made to George J. Durham as one of the vestry of the Episcopal church of the city of Austin; that the vestry consists of persons who have charge of and are trustees for the temporal affairs of the church; that after this subscription and others were made, and upon the faith and credit of them, the vestry contracted with Hopkins and one Sidegast to build the church, who gave bond for the performance of the contract; that they, the contractors, in consideration of this and other like subscriptions, undertook the contract, and did build the church; that after the contract was made, and before suit was brought, the vestry transferred the subscriptions over to the contractors, after which Sidegast transferred all his interest in the contract to Hopkins, who completed the work according to contract, and which was satisfactorily received by the vestry.

Do these circumstances, in connection with the instrument, defeat the objections above referred to, and justify the suit? We think so.

First, as to the want of payees. The men who constitute the "vestry" were originally the payees. They were not named in the instrument, but the witness Durham says that "it was made to him as one of the vestry of the Episcopal church." They were the persons intended to receive the donations for the purposes set forth, and it was delivered to one of them for all. A consideration is as essential to the validity of a contract as proper parties. It would not be contended that a consideration could not be averred and proved, although it was neglected to be stated in the face of the contract. Why not the same of a payee, if one really existed, though omitted by inadvertence or other cause? It has been settled that a *bona fide* holder of a bill of exchange, in which a blank was left for the name of the payee, may insert his own name, and bring suit on it. So also may a suit be brought on a note or bill payable "to bearer," without the name of any person appearing in it as payee: *Cloze v. Fields*, 2 Tex. 232. Such bills, though defective in form, constituted a part of a real transaction, which was allowed to be developed by adducing that which does not appear upon their face.

In the case of *Dickson v. Montgomery*, 1 Swan, 348, the testator, in making an endowment, misnamed the college, and also the party intended to take the bequest, and by proof it was shown what institution of learning and what party were meant to be designated. It was there said "that where the name or description of a legatee is erroneous, and there is no reasonable

doubt as to the person who was intended to be named or described, the mistake will not disappoint the bequest. The true intention of the testator may be ascertained, and the error corrected." If, then, an error in the instrument may be corrected by proof of the real facts, so with equal propriety it may be shown who the parties are that were intended in this transaction.

The leading case relied on in opposition to this view is the case of *Phillips Academy v. Davis*, 11 Mass. 113 [6 Am. Dec. 162]. In that, a subscription was signed by about sixty persons to raise means to build an academy; and afterwards, by an act of incorporation, trustees for the academy were created, who brought the suit against Davis, a subscriber. The suit failed, because there was no payee in existence at the time of the subscription who could take or sue, and there was no privity of contract between the subscriber and trustees. The points of difference between that case and this are, first, the subscription in that was made in favor of no particular persons, nor was it delivered to any person; in this, it was delivered, and there were persons intended to receive the donation. That case was an action of *assumpsit* founded on the subscription in a common-law state, where the plaintiff must show a legal title in himself to maintain his suit, which he could not do. This case is brought in a court exercising full equity powers to act upon the subscription, and proof of surrounding circumstances showing fully the real transaction; and where, too, the doctrine is fully recognized that any chose in action may be assigned and suit brought thereon by an equitable holder: *Devine v. Martin*, 15 Tex. 25. The subscription, then, having been made and delivered to the vestry, by them, for a valuable consideration, assigned to Hopkins and Sidegast, and by Sidegast to Hopkins, the latter has a right to sue, so far as it depends upon a mere question of parties to the contract.

The other two objections—of want of mutuality and of consideration—may be presented together

At the time Upshur made and delivered the subscription to Durham, it is true that the vestry did not and had not bound themselves to build the church; and it is also true that there was no consideration then executed. It may well be admitted that there was at that time no cause of action against Upshur. When and by what acts, then, did it accrue? The answer is, When the vestry assumed liabilities and incurred expenses in building the church, upon the faith of the subscription.

In *Amherst Academy v. Cows*, 6 Pick. 433 [17 Am. Dec. 387], Parker, C. J., ruled that if, by means of a solemn promise to pay, the body to whom the promisor had pledged his word should encounter expense, or assume legal liabilities, this was a sufficient consideration to support such a promise.

It is not necessary that a consideration should exist at the time of subscription, which is in the nature of a proposition, and the performance of the work is the acceptance of the proposition, and also the consideration which supports it, as a valid, binding proposal: *Barnes v. Perine*, 9 Barb. 202. "The general principle is, that voluntary agreements and promises, however reasonable the expectation from them of gifts or disbursements, even to public uses, when made without consideration, are not to be enforced as contracts; but where it is a proposal upon a consideration afterwards performed, this may import a sufficient consideration:" *Phillips Academy v. Davis*, 11 Mass. 117 [6 Am. Dec. 162]. Nor is it necessary that there should be a party, payee at the time of the subscription, with a corporate capacity or otherwise, capable of receiving, suing, or binding himself to a performance, so as to secure mutuality then in the contract. A case in point, where the payee did not bind himself, but services were performed afterwards, is *First Religious Society of Whiteslown v. Stone*, 7 Johns. 113.

In the case of *Thompson v. Page*, 1 Met. 565, there was no payee in existence at the time of the subscription. That was a subscription by an association of persons to aid in the building of a meeting-house. Payment was to be made to a treasurer to be selected by a majority of the associates, at a meeting to be held for that purpose. A person was afterwards chosen treasurer, who brought and maintained a suit for a sum subscribed on the list. See also *George v. Harris*, 4 N. H. 533 [17 Am. Dec. 446]; and *Ives v. Stirling*, 6 Met. 310. Justice Story lays down the rule that "when a charity is definite in its objects, and lawful in its creation, and it is to be executed and regulated by trustees, whether they are private individuals or corporations, then the administration properly belongs to such trustees:" 2 Story's Eq. Jur., sec. 1191.

It is further contended by appellee that he revoked this voluntary agreement by refusing to pay it.

Under the principles heretofore announced, it may be that he could have done so at any time before any legal liabilities or expense had been incurred on the faith of his promise; but certainly not afterwards: *Amherst Academy v. Cows*, 6 Pick. 433

[17 Am. Dec. 387]; *Barnes v. Perine*, 9 Barb. 202. The facts of this case, however, do not sustain this position; for after the church had been contracted for, and during the time the foundation was being laid, he was called on by one of the building contractors for the amount subscribed by him, and he refused to pay it. The ground of his refusal was not in the nature of a retraction, but that he had never signed the subscription. And he then agreed that if his name could be shown on it in his own handwriting, he would pay it. The statement of facts shows that it was there, and in his own handwriting. This was not a retraction; and if it had been, it was not made in time to avail him.

The result of the preceding views is, that the subscription was a voluntary agreement to donate to the vestry, as trustees of the temporal affairs of the church, for the erection of a church building, matured into an enforceable contract by Upshur having permitted the trustees to incur legal liabilities, and encounter expense, upon the faith of it.

Another objection to this suit is taken, which strikes at its foundation; that is, that a court of equity has no power in this state to uphold and enforce such a trust for a charity. It is contended that this jurisdiction was given to the court in England by statute; and there being no such statute here, the power is wanting: See case cited by appellee, *Green v. Allen*, 5 Humph. 170. We think the contrary is settled by the weight of authority, and that a court of equity has such power by virtue of its general jurisdiction, independent of a statute. This is fully shown in a case decided by the supreme court of the United States: *Vidal v. Philadelphia*, 2 How. 127; see also 2 Story's Eq. Jur., sec. 1191; and *Dickson v. Montgomery*, 1 Swan, 348.

We are of opinion, therefore, that the facts of this case entitle Hopkins, the plaintiff below, to sue for and recover the amount subscribed by Upshur.

The judgment of the district court is reversed, and judgment rendered for plaintiff below, as it should have been done by the district court.

Reversed and reformed.

ACTIONS UPON SUBSCRIPTIONS.—Recovery may be had upon subscription after work has been done and debts contracted upon faith of the subscriptions: See note to *Phipps v. Jones*, 59 Am. Dec. 713, discussing the subject; *Basford v. Brown*, 38 Id. 281; *Galt's Ex'r v. Swain*, 60 Id. 311; *Commissioners of Lucas Co. v. Hunt*, 67 Id. 303.

VALIDITY OF SUBSCRIPTION AS CONTRACT: *State Treasurer v. Cross*, 31 Am. Dec. 626; *Cumberland Valley R. R. Co. v. Baab*, 36 Id. 132; *Galt's Ex'r v. Swain*, 60 Id. 311; *Commissioners of Lucas Co. v. Hunt*, 67 Id. 303.

RIGHT OF ASSIGNEE OF CHOSE IN ACTION TO SUE: *McKee v. Judd*, 64 Am. Dec. 515, and collected cases in note thereto 517.

JURISDICTION OVER CHARITABLE USES AND TRUSTS EXISTS IN COURTS OF CHANCERY, independently of the statute of charitable uses, 43 Elizabeth: *Ref. Prot. Dutch Church v. Mott*, 32 Am. Dec. 613; *Urney's Ex'rs v. Wooden*, 59 Id. 615; *Shields v. Jolly*, 42 Id. 349.

THE PRINCIPAL CASE WAS CITED in *McCrimmin v. Cooper*, 27 Tex. 115, to the point that it is now a well-settled principle in the courts of Texas that payment of a voluntary subscription, on the faith of which expense has been incurred, or legal liabilities assumed, may be enforced.

DAWSON v. MILLER'S ADMINISTRATOR.

[20 TEXAS, 171.]

NEW REMEDY GIVEN BY STATUTE for failure of a bidder to comply with the terms of a probate sale is cumulative, and does not take away the common-law remedy, or remedy by suit, to compel specific performance.

SALES BY AUCTIONEERS, SHERIFFS, OR ADMINISTRATORS ARE WITHIN STATUTE OF FRAUDS, and the auctioneer may be regarded as the agent of both vendor and purchaser, with authority to sign for them equally in sales of real or personal property.

CONTRACT RELATING TO REAL PROPERTY need not be alleged to be in writing. That is a matter of proof upon the trial.

SPECIFIC performance. Dread Dawson, administrator of the estate of Elizabeth Sessions, sold certain lands at public auction, and W. D. Miller and S. A. Johnson were the successful bidders. He then tendered them a deed, but they failed to comply with the conditions of the sale. Plaintiff then brought suit to compel specific performance, and garnished defendants' property. Miller died pending the suit, and his administrator was made a party in his stead. Defendants answered by general demurrer, and moved to quash the attachment. The motion was sustained and the suit dismissed. Plaintiff appealed.

Barriza, for the appellant.

Lewis and Davis, for the appellees.

By Court, WHEELER, J. It is not perceived on what ground the court quashed the attachment. None is suggested in argument, and the causes assigned in the motion to quash appear not to have been well taken. The judgment in that regard must therefore be deemed erroneous.

In support of the judgment dismissing the petition, two grounds are suggested: 1. That the statute gives another remedy; 2. That the contract was void under the statute of frauds.

In respect to the first ground, it will suffice to say that we regard the remedy given by the statute, Hart. Dig., art. 1175, as merely cumulative, and not as intended to take away the common-law remedy, or the remedy by suit to compel specific performance of the contract.

In respect to the remaining ground suggested, it is to be observed that the petition alleges a contract of sale and purchase; and whatever doubts may have been formerly entertained, it is now well settled that sales by auctioneers, sheriffs, and masters in chancery (and the doctrine applies equally to administrators' sales) are within the provisions of the statute of frauds, and that the auctioneer may be regarded as the agent of both vendor and purchaser, with authority to sign for them equally in sales of real and personal property: 2 Parsons on Cont. 292, note e; 2 Kent's Com. 539, 540; *Brock v. Jones*, 8 Tex. 78. It is not averred that the contract of sale was in writing; but it has been held that this averment is not necessary: *James v. Fulcrod*, 5 Id. 512 [55 Am. Dec. 743]. That will be matter of proof upon the trial. It was sufficient to allege a contract. If the plaintiff shall fail to prove, upon the trial, that it was in writing, he must fail in his action: *Brock v. Jones*, *supra*. But the failure to aver that it was in writing was not a ground for sustaining the demurrer. The judgment is reversed and the cause remanded.

Reversed and remanded. —

WHEN STATUTORY REMEDY IS TO BE DEEMED CUMULATIVE: See *People v. Craycroft*, 56 Am. Dec. 331, and note 332. When it is to be deemed exclusive: See *Troy v. Cheshire R. R. Co.*, 55 Id. 177; *Bassett v. Carleton*, 54 Id. 605; and note to *Aldrich v. Cheshire R. R. Co.*, 53 Id. 215, where other cases are collected.

AUCTION SALES ARE WITHIN STATUTE OF FRAUDS; but the auctioneer is agent for both parties, and his memorandum in writing is sufficient to take the case out of the statute: *Pike v. Balch*, 61 Am. Dec. 248; *Craig v. Godfroy*, 54 Id. 299, and note, where prior cases are collected.

ALLEGATION THAT AGREEMENT IS IN WRITING is unnecessary, under the statute of frauds, in a petition in a suit concerning lands: *James v. Fulcrod*, 55 Am. Dec. 743.

THE PRINCIPAL CASE IS OFFED in *Hoffman v. Cartright*, 44 Tex. 200, and in *Fisher v. Bowser*, 41 Id. 223, to the point that the authority of an agent to sell land need not be in writing.

WOOD v. CHAMBERS.

[20 TEXAS, 247.]

CALLING MINDS OF JURY TO PARTICULAR PARTS OF EVIDENCE is objectionable as giving such parts undue prominence, but where it is done at the request of one party, and the same favor is afterwards, by request, extended to the other party, it will not be considered sufficient error to warrant a reversal of the judgment.

VALUABLE CONSIDERATION WILL NOT OF ITSELF RENDER CONVEYANCE VALID under the statute of frauds. It must also be *bona fide*.

PURCHASER SEARCHING RECORDS SHOWS INTENT TO GET GOOD TITLE to the land, but does not show that he did not know he was enabling the vendor to defraud his creditors.

EFFECT OF ERRONEOUS INSTRUCTIONS MAY BE REMOVED by other portions of the charge, and if upon the whole the charge is not unfavorable to the appealing party, judgment will not be reversed.

CONVEYANCE OF HOMESTEAD FOR VALUABLE CONSIDERATION cannot be deemed a conveyance to defraud creditors, from whose claims there is a permanent enduring exemption.

TRESPASS to try title. Charles Railey owned four hundred acres of land, two hundred acres of which was his homestead. In June, 1849, suits were commenced against him. In October he conveyed the two hundred acres not subject to the homestead to his son James Railey, for a consideration of eight hundred dollars. In February, 1851, James conveyed said tract to defendant Chambers for a consideration of one thousand five hundred dollars, and Charles Railey and wife conveyed the homestead on the same day to the same party for a consideration of two thousand dollars. In April and October, 1851, judgments were obtained against Charles Railey; the whole of the land was sold under execution, and plaintiff Wood became the purchaser. He alleges that the conveyances made by Railey and his son were made to hinder, delay, and defraud creditors, and that defendant Chambers had notice, and this was the issue tried. Defendant requested, among others, the following instructions: "7. That the payment of a valuable and adequate consideration for the land is a circumstance that the jury should consider in determining the good faith and fair dealing of the purchaser; 8. That the defendants causing an investigation to be made as to the right of the Raileys to convey a good title is another circumstance for the jury to consider in determining the good faith and fair dealing of the defendant in the transaction." Verdict and judgment for defendant. New trial denied and plaintiff appealed.

G. W. Horton and J. E. Shepard, for the appellant.

N. Holland, for the appellee.

By Court, WHEELER, J. The seventh and eighth instructions complained of are objectionable as calling the minds of the jury to particular parts of the evidence, and giving those parts undue prominence, instead of leaving the question of intention to be decided by them in view of all the circumstances of the case. The example of this objectionable mode of asking charges, however, had been set by the plaintiff in the instructions asked by him. His instructions, repeating in detail portions of the evidence, having been given, it was natural that the defendant should seek to countervail their effect by bringing prominently to view other portions, which he deemed favorable to himself.

But a graver objection to these charges is their tendency to confound ideas which ought to be kept distinct. To render a conveyance valid under the statute of frauds, Hart. Dig., art. 1452, it is not enough that it is for a valuable consideration. It must also be *bona fide*; for if it in fact be made to defraud or defeat creditors, it will be void although there may be a valuable and an adequate consideration: *Edrington v. Rogers*, 15 Tex. 188; 1 Story's Eq. Jur., sec. 369. In the seventh charge this principle is lost sight of. Because an adequate consideration was paid, it does not follow that the purchaser did not know that his vendor made the conveyance to defeat and defraud his creditors. So of the eighth instruction, the examination in the clerk's office to see if there was any lien or incumbrance upon the land proves that the defendant intended to get a good and indefeasible title; but not that he did not know that he would thereby enable his vendor to defraud his creditors. That is a *non sequitur*. The question was one of good faith, depending upon actual knowledge and intention on the part of the defendant and his vendor; and that question the jury were to decide upon a view of all the evidence before them. If they had not been so informed distinctly in other portions of the charge, and the objectionable instructions stood alone, unexplained by other instructions, they would certainly require a reversal of the judgment. But the true questions for the jury to decide, and the evidence upon which they must decide, were clearly and distinctly presented, and in their application expressly to the facts of the case, in the instructions given at the instance of the plaintiff. These instructions were so clear, express, and positive, and were enforced in so many forms of expression, that it

is scarcely possible their effect could have been impaired, or that the jury were misled by the instructions complained of. Any injurious effect which the latter might have had, standing alone, must have been effectually counterbalanced by the former. And we have heretofore decided that it is not sufficient to reverse a judgment that the charge to the jury embraces erroneous propositions, if their effect is removed by other portions of the charge, and upon the whole the charge was not unfavorable to the party seeking the reversal: *Mercer v. Hall*, 2 Tex. 284; as in the present case, we do not deem that it was.

As to the two hundred acres which are within the homestead exemption, it is clear the plaintiff can have no right of action. The English doctrine, it is said, is that in order to make even a voluntary conveyance void as to creditors, existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts: 1 Story's Eq. Jur., sec. 367. Clearly the conveyance of the homestead for a valuable consideration cannot be deemed a conveyance to defraud creditors from whose claims there is a permanent, enduring exemption, placed beyond the power even of the legislative authority. And as to the other two hundred acres, we are of opinion the verdict of the jury was uninfluenced by any error in the charge of the court; and the question being one of fact peculiarly within the province of the jury, that their verdict was not so contrary to evidence as to warrant the reversal of the judgment on that ground. On the whole, we are of opinion, therefore, that it be affirmed.

Judgment affirmed.

FULL CONSIDERATION FOR FRAUDULENT CONVEYANCE is not sufficient to validate a deed unless accompanied by good faith on the part of the vendee: *Rogers v. Evans*, 56 Am. Dec. 537, and note 540; *Clark v. Depew*, 64 Id. 717; *Jessup v. Johnson*, 67 Id. 243.

INSTRUCTIONS ERRONEOUS IN ONE POINT, BUT COLLECTIVELY CORRECT, and properly expounding the law as a whole, are not ground for reversal, and the instructions are to be taken as a whole: *Terry v. Buffington*, 56 Am. Dec. 423; *Williams v. Vanmeter*, 41 Id. 644. Erroneous instructions are not cured by the fact that correct instructions accompany them: *Hickman v. Griffin*, 34 Id. 124; but if the erroneous instructions could not have worked an injury nor misled the jury, judgment will not be reversed on account of their being given: *Nicholson v. New York etc. R. R. Co.*, 56 Id. 390; *McPherson v. McPherson*, 53 Id. 416; *Johnson v. Evans*, 50 Id. 669; *Zachary v. Pace*, 47 Id. 744; *Armstrong v. Tait*, 42 Id. 656; and *People v. Cunningham*, 43 Id. 709, note 718, where prior cases are collected.

THE PRINCIPAL CASE IS CITED in *Cox v. Shropshire*, 25 Tex. 124, and *Martel v. Somero*, 26 Id. 559, to the point that to render a conveyance void

as to creditors, it is indispensable that it should transfer property liable to be taken in execution for the payment of debts; in *Lynn v. Le Gierse*, 48 Id. 140, as a precedent for the practice of selling in execution land fraudulently conveyed away, and of the purchaser bringing suit to set aside the conveyance and recover the land; and in *Hardy v. Broadus*, 35 Id. 685, to the point that a *bona fide* purchaser will be protected in the property purchased even against creditors.

LOOKRIDGE v. BALDWIN

[20 TEXAS, 303.]

DISTRICT COURT HAS JURISDICTION TO RECOVER FROM BIDDER, who fails to comply with the terms of an execution sale, twenty per cent on the value of the property bid off by him, although the amount to be recovered is less than one hundred dollars.

SALE UNDER WRIT OF VENDITIONI EXPONAS IS SALE "BY VIRTUE OF EXECUTION," within a statute providing "that if any person shall bid off property at any sale made by virtue of an execution, and shall fail to comply with the terms of the same, he shall be liable," etc.

ERROR IN INTRODUCING SECONDARY EVIDENCE IS CORRECTED AND OVERCOME by the subsequent introduction of primary evidence to the same point.

PURCHASER AT EXECUTION SALE MUST COMPLY or manifest readiness to comply with the terms of the sale before he can expect a deed to be given or even tendered to him.

STATUTE OF FRAUDS HAS NO APPLICATION TO ENFORCEMENT OF PENALTY for not completing the contract of sale of land agreed upon, by making a bid at an execution sale.

MOTION to recover penalty. Certain land sold by the sheriff under a writ of *venditioni exponas* was bid in by defendant. He failed to pay the price bid, and the property was again exposed for sale. He bid it in again, but did not immediately pay the money, and the sheriff again advertised it for sale, but defendant paid the amount bid, and received a deed before the day of sale. Plaintiff asked for damages on both sales. The court gave judgment for the amount of penalty on the first bid, and defendant appealed.

Stewart and Mills, for the appellant.

Parker and Nichols, for the appellees.

By Court, ROBERTS, J. This is a motion in the district court against a bidder at a sheriff's sales of land under a writ of *venditioni exponas*, to recover seventy-five dollars and forty cents, being twenty per cent on the amount of his two bids, on account of his having failed to comply with the terms of the sales according to his bids.

The court rendered a judgment for forty-seven dollars, that being twenty per cent on the amount of the first bid. It will be unnecessary to consider the questions arising on the second.

Lockridge, the defendant, objected to this motion: 1. That the district court had no jurisdiction, the amount sought to be recovered being under one hundred dollars; and 2. That the sale, having been made under a writ of *venditioni exponas*, was not a sale "by virtue of an execution," and that therefore the statute giving this remedy does not apply to a bid at such sale.

1. The statute under which this motion is made reads as follows: "That if any person shall bid off property at any sale made by virtue of an execution, and shall fail to comply with the terms of the same, he shall be liable to pay to the plaintiff or plaintiffs in execution twenty per cent on the value of the property so bid off, besides costs, to be recovered before the court whence the execution issued, by motion, three days' previous notice being given to him or her that said motion will be made:" Hart. Dig., art. 1338.

By becoming the highest bidder at the sale, the defendant made himself a participant in and about the suit of *Baldwin, Starr, & Co. v. Russell et al.*, the judgment in which was being executed by the process of the court. If he had complied with the terms of the sale, he would have been giving aid to its execution; but as he failed to comply, he was thwarting the course of the law in its administration of justice between the parties. His act is in the nature of a contempt to the court by the obstruction of its process. If the court had not the right to compel respect for its process of execution by the enforcement of some such penalty, it might often be powerless, and would fail to execute its own judgments, by an endless succession of bids not complied with by the bidders. Courts of general jurisdiction have an inherent power of self-protection by punishing acts done in contempt of their process: 4 Bla. Com. 285. This act was passed to regulate and give direction to this power; and it gave to the plaintiff the right to make the motion to enforce the penalty, because his interest, being directly affected by such act, would be a strong incentive to induce him to move against any one who should thus endeavor to trifle with the process of the court.

2. To maintain this motion, the sale must have been by virtue of an execution. Execution is defined to be the act of carrying into effect the final judgment of a court. The writ which authorizes the officer so to carry into effect such judgment is

also called an execution: 1 Bouv. Law Dict. 495. *Venditioni exponas* is "a writ of execution, directed to the sheriff, commanding him to sell goods or chattels, and in some states lands, which he has taken in execution by virtue of a *fiery facias*, and which remain unsold:" 2 Id. 621.

In Tidd's Practice it is said that "if the sheriff return (on a *fiery facias*) that he has taken goods which remain in his hands for the want of buyers, the plaintiff may sue out a writ of *venditioni exponas*, reciting the former writ and return, and commanding the sheriff to expose the goods to sale, and have the moneys arising therefrom in court at the return of it; or if goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *fiery facias* for the residue, in the same writ:" 2 Tidd's Pr. 1020.

It will be seen that the writ issued in this case answers exactly the description of a *venditioni exponas* as defined by these authors. The question is, whether such a writ is contemplated by the use of the word "execution" found in this statute. At the first organization of the district courts by the republic of Texas, it was enacted that "it shall be the duty of the judge of any court to cause the judgment, sentence, or decree of the court to be carried into execution agreeably to law:" Hart. Dig., art. 1268. In 1839 a general execution law was passed, giving the form of the writ, corresponding to the common-law writ of *fiery facias*, except that it included lands as well as goods and chattels: Id., arts. 1271-1287. This act was repealed by the act of 1840, and another general act passed, in which the form was omitted, and no directions given as to the form of the writ: Id., arts. 1288-1310. This was after the adoption of the common law, Id., art. 127, which was by act of January 20, 1840. One year after the adoption of the common law an act was passed exempting slaves from "forced sales, by virtue of any writ of *venditioni exponas*, *fiery facias*, or execution of any kind," etc.: Id., art. 1322. This act was repealed during the same year, and it is only cited for the purpose of showing that the legislative authority had recognized *venditioni exponas* as one of the writs of execution. It is quite reasonable that, upon the adoption of the common law, the courts and their officers should at once adopt the writs known and used in common-law countries, so far as they were in accordance with our own statutes. And it may well be presumed from this act that this writ had thus come into practice. There was not then, nor is there yet, any statute contravening its use.

After this statutory recognition of this writ, an act was passed, styled "An act to reduce into one and amend the several acts concerning executions," which is still in force. This does not give any form or name of an execution, and it is fair to presume that such writs were intended to be used as were then in use, and recognized by former laws.

A writ of execution is the embodied power of the court in the shape of a command to a ministerial officer, respecting the rights of the parties to the judgment, and imposing upon the officer certain duties and liabilities prescribed by law. The writ must assume a shape with reference to those rights, duties, and liabilities thus prescribed. For instance, we cannot adopt the form of *feri facias* strictly because it is the right of the plaintiff to have the defendant's land sold if necessary, and it is the duty of the sheriff to levy on it in the enforcement of a judgment, upon the contingency and in the manner prescribed by law: Hart. Dig., art. 1327. So, too, the writ of *levari facias* is not applicable for the same reason. The writ of *capias ad satisfaciendum* cannot be taken out, because our constitution has abolished imprisonment for debt, and the plaintiff has no right to take the body in satisfaction: Bill of Rights, Id., p. 52, sec. 15. The law, then, giving the plaintiff the right to have the defendant's lands, as well as his goods and chattels, sold absolutely, makes the writ of *feri facias* most applicable, and requires but a slight addition for its adoption. Nor does that change (extending it to the sale of lands) materially alter the principles of law attaching to it as a process of execution.

The writ of *venditioni exponas* arises out of, and is partly dependent upon and auxiliary to, the writ of *feri facias*. It but embodies the rights of the parties and the duties of the officer, after an execution has been returned with a levy on property indorsed on it. It had its origin, as is very probable, in the exigencies of the sheriff's duties and liabilities. For if the sheriff levied on property by virtue of a *feri facias*, and the return day arrived before he had sold the same, he had the power, and it was his duty, to sell it after that day: Tidd's Pr. 1021; *Hamilton v. Ward*, 4 Tex. 356. If the sheriff did not return the writ at return day, he was liable to a rule or to a suit: Tidd's Pr. 1017-1019; Hart. Dig., art. 1287; if it were doubtful whether he had levied on property sufficient to satisfy the judgment, it was hazardous for him to retain the execution. That difficulty was obviated by his returning the *feri facias*, with his levy indorsed on it, with an excuse for not selling, and then the

plaintiff could take out an order of sale to sell the property thus levied on for his benefit, and this was the writ of *venditioni exponas*, which could be issued singly, as in this case, or in conjunction with another writ of *feri facias*: Tidd's Pr. 1020.

Upon principle, we can see no objection to this as a writ of execution, and deem it to be lawful.

The most usual practice, perhaps, is to issue another execution, and indorse on it the levies returned by the sheriff on the former writ; and we do not say that this is not the correct, and perhaps the best, practice.

An exception is taken by the appellant that the court erred in admitting the judgment and previous executions to be read in evidence. Without deciding that this evidence was necessary, it was but introductory in its character to show the foundation upon which the writ of *venditioni exponas* was predicated, and could not possibly prejudice the appellant's cause.

The plaintiff read in evidence the return of the sheriff on the writ of *venditioni exponas*, to show that the defendant had bid off the land, and had failed to comply with his bid; to which defendant excepted as being secondary evidence. It is a sufficient answer to this objection, without discussing its merits, that the deputy sheriff, who made the return, was immediately placed on the stand, and testified to all the facts pertaining to the sale, as stated in the return. And if it be admitted that the return was secondary evidence, the defect was supplied and supplanted at once by what, in the objection, was admitted to be the best evidence.

It is contended that the defendant was released from his bid by the fact that the sheriff did not tender him a deed on the day of sale. The statement of facts shows that two days after the sale the sheriff tendered a deed, and demanded a compliance with the sale. By the statute, it is provided "that when a sale has been made and the terms thereof complied with, the sheriff shall execute and deliver to the purchaser a conveyance," etc.; and also "that when the terms of the sale shall not be complied with by the bidder, the sheriff shall proceed to sell the property again on the same day, if there be sufficient time; but if not, he shall readvertise the same for the next succeeding regular sale day:" Hart. Dig., arts. 1345, 1339. It does not appear why the sheriff did not again sell the property on the same day; and in the absence of all testimony on that subject, it may be presumed that the sheriff did his duty under the circumstances.

It may be, under a proper construction of these two clauses,

that either party would have a right to insist upon the sale being concluded, at least by some written memorandum, and by payment of the purchase money on the day of sale, or at least as soon as practicable. But it is for the purchaser to take the first step, by complying, or manifesting a readiness to comply, with the terms of the sale before he can expect the deed to be given or even tendered to him. And if he does not do so on the day of sale, no good reason is seen why the purchaser would be released from his bid by his own failure for two days to take the initiative towards closing the contract, and by his entire refusal then to comply when a deed was tendered to him by the sheriff.

The objection that there was no memorandum in writing made to bind the contract of sale is equally untenable. This is not a proceeding to enforce a contract for the sale of land, but to enforce a penalty for not completing the contract of sale agreed upon by the making of the bid: Hart. Dig., art. 1451; *James v. Fulcrod*, 5 Tex. 512 [55 Am. Dec. 743].

We are satisfied that this is a proper case for the exercise of this remedy, so necessary to protect the rights of litigants, and so necessary to sustain the majesty of the law. Judgment is affirmed.

Judgment affirmed.

CIRCUIT COURT HAS JURISDICTION TO WATCH OVER EXECUTION OF ITS DECREES, and to regulate all proceedings under them until the case is finally disposed of: *Tooley v. Gridley*, 41 Am. Dec. 628.

IMPROPER ADMISSION OF RECORD COPY OF INSTRUMENT IS CURED by the subsequent production of the original: *Hart v. Gregg*, 36 Am. Dec. 166; and where a party whose declarations were improperly introduced in evidence afterwards takes the stand and testifies in exact accordance with the declarations, it was held that the court cannot say that their admission resulted unfavorably to the appellant: *Innis v. Steamer Senator*, 54 Am. Dec. 305, and note.

FAILURE OF PURCHASER AT EXECUTION SALE TO MAKE OR OFFER PAYMENT within the time agreed is a default upon his contract for which he is liable: *Coffman v. Hampton*, 37 Am. Dec. 511; and the sheriff or plaintiff may sue for breach of contract: *Robinson v. Garth*, 41 Id. 47.

THE PRINCIPAL CASE IS CITED in *Young v. Smith*, 23 Tex. 599, 600; *Borden v. Tillman*, 39 Id. 272; *Borden v. McRae*, 46 Id. 400; and *Seguin v. Maverick*, 24 Id. 532, to the point that a *venditioni exponas* is a writ of execution known to the law, and will confer authority upon an officer to sell land.

VANDEVER'S ADMINISTRATORS v. FREEMAN.

[20 TEXAS, 333.]

SUIT TO CANCEL DEED ALLEGED TO BE IN TRUST need not be brought in the county in which the land is situated.

SUIT TO TRACE TRUST FROM LAND TO MONEY through an estate in process of administration is not a suit upon a claim, required to be presented to the administrator for allowance.

CLAIM TO BE SUBROGATED TO RIGHTS OF ADMINISTRATOR AGAINST INNOCENT PURCHASER of land held in trust by the deceased, but sold by the administrator on credit, is not a claim required to be presented to the administrator for allowance.

WANT OF CONSIDERATION FOR DEED IS EVIDENCE OF TRUST RELATION between the parties.

POSSESSION OF LAND BY GRANTORS AFTER CONVEYANCE is a strong corroborative circumstance to establish a trust relation between grantor and grantee.

PAYMENT OF PURCHASE MONEY AS EVIDENCE OF TRUST is an affirmative fact, and must be established by higher testimony than proof of declarations of the deceased alleged trustee.

NON-PAYMENT OF PURCHASE MONEY AS EVIDENCE OF TRUST is a negative fact, and the admissions of the deceased alleged trustee become appropriate evidence, and when sustained by corroborating circumstances, comply with the rules of evidence.

ALLEGATION THAT CONVEYANCE WAS TO DEFRAUD, HINDER, AND DELAY CREDITORS, made as a defense by a grantee against a grantor, who seeks to have the deed declared a trust, should be supported by evidence that there were creditors at the time of the conveyance.

SALE OF HOMESTEAD PREMISES, NOT LIABLE FOR DEBTS, cannot be regarded as evidence of intent to defraud, hinder, or delay creditors.

CESTUI QUE TRUST MAY BE SUBROGATED TO RIGHTS OF ADMINISTRATOR, where land held in trust by a deceased trustee has been sold on credit by the administrator. The notes taken in payment will be canceled, and the money will be ordered to be paid by the innocent purchasers to the *cestui que trust*.

SUIT to cancel deed. Freeman and wife executed a deed for certain land to Vandever, alleged to be in trust. Vandever died, and his administrator sold the land to Myrick and Mayes, who gave their notes for the purchase money, but paid no part of it. Freeman brought suit to have the deeds to Myrick and Mayes canceled, or if that could not be done, then to be subrogated to the rights of the administrator, have the notes canceled, and the money to become due on them paid to him. The court gave judgment for plaintiff, and granted the latter prayer. It appeared that Myrick and Mayes were "innocent purchasers without notice" of plaintiffs' claim. The administrators appealed.

Chandler and Turner, for the appellants.

Fisk and Bowers, for the appellees.

By Court, ROBERTS, J. This is a suit to set aside and cancel a deed executed by Freeman and wife for certain land to Vandever, alleged to be in trust for a purpose, which was not accomplished; or if the land had been sold to an innocent purchaser, then to reach the purchase money by a direct recovery from the purchaser.

Under the latter alternative, Freeman and wife recovered a judgment, which is brought here for revision on appeal.

It is objected to this proceeding, that as a suit for land it is wrongly prosecuted in Burnett county, the land being situated in Gillespie county; and as a suit for money it must fail, because the claim was not presented to the administrators. These objections presuppose a state of case that does not exist. For the suit is not for the recovery of the land, or for the recovery of a claim against the estate of Vandever, but it is to quiet the title by a cancellation of the deed if practicable, or to trace a trust from land to money through the estate, which it is competent for a court of equity to do. That the deed was made in trust for some purpose is fully established. All the witnesses, four in number, state that Vandever said he had given no consideration for the deed. The witnesses to the deed state that no consideration passed from Vandever to Freeman and wife. The pleadings of defendants show or take for granted that Freeman and wife continued in possession of the land, and pray a writ of possession to be awarded to defendants at the termination of the suit; which is a strong corroborative circumstance to establish the trust. In *Mead v. Randolph*, 8 Tex. 191, which is very analogous to this, it was held that one witness with strong corroborating circumstances could establish such a trust, although the trustee was dead. This, as well as *Mead v. Randolph*, *supra*, is distinguishable from the case of *Neill v. Keese*, 5 Id. 23 [51 Am. Dec. 746], and other like cases, in this, that in those the payment of the purchase money is an affirmative fact, upon which the trust sought to be set up is based; and therefore it must be established by other and higher testimony than by proof of the declarations of the deceased trustee. In this case the non-payment of the purchase money by Vandever, upon which complainants seek to base the trust, is a negative fact, not susceptible of direct proof, if their allegation be true. It can only be proved by establishing circumstances corroborative of and consistent with

the truth of their allegation; and in this point of view the admissions of the deceased trustee, well established, become appropriate, and frequently the principal, testimony, to establish the negative fact. When, however, the admission is not only well established, but amply sustained by a strong corroborating circumstance, as in this case, the rule of evidence is complied with: *Mead v. Randolph*, 8 Id. 191. The point being settled that the deed was made upon trust for some purpose, the important question in the case remains yet to be determined; and that is, Was the conveyance made to defraud, hinder, or delay creditors?

A. O. Cooley, who seems to be an intelligent and impartial witness, states that he was called on by Vandever on two occasions, and for the purpose of enlisting his aid if necessary, he was put in possession of all the facts by Vandever as to the consideration and objects of the conveyance. This witness shows that the object of the deed was to enable Vandever to effect a sale or other disposition of the property for Freeman and wife. He further states that he heard Vandever say that "he was convinced that a party here were making every effort to crush Freeman's family, by getting up and urging unjust claims against him [Freeman] and attaching Mrs. Freeman's property for them; that he knew this property was bought by her when she was Mrs. Holden, before her marriage with Freeman; but that it was better for her to sell it, and avoid expense and annoyance in defending it from claims against Freeman." Several of the other witnesses state that they heard Vandever say "that the deed was made for the purpose of securing Mr. Freeman from having his property taken for some illegal debt." These remarks, thus detailed by these other witnesses, were isolated from any connecting circumstances, and are entirely consistent with the version of the matter given by Cooley, when taken in connection with his testimony. That conclusion is strengthened by the fact that the evidence does not show that there were any debts against Freeman, or that he was ever in any way involved either in debt or in litigation, even up to the time of the trial; and also by the fact that as Freeman and wife were in possession of the land, it was most probably their homestead, and would not have been liable for the debts. And again, whenever debts are spoken of, they are represented as unjust claims, in anticipation to be preferred against Freeman, and no real creditors are shown to have ever existed.

All this testimony considered together is capable of the con-

struction that there really were and have been no creditors, or that this property was not liable for Freeman's debts; and that the deed was made in trust for the sale of the land. Phantom fears may have entered into their motives in wishing a sale to avoid the perplexities, as they imagined, of standing upon their legal rights; but that it was not done to defraud creditors. In some such light must the court below have viewed the case. Having been determined in favor of appellees, it is sufficient, so far as the action of this court is concerned, that the testimony, regarded in its strongest light for appellants, presents conflicting tendencies, of a character which would forbid the reversal of that determination, on the facts. The judgment is affirmed.

Judgment affirmed.

POSSESSION AS PRIMA FACIE EVIDENCE OF TITLE: See *Plume v. Seward*, 60 Am. Dec. 599, note 601, where the subject is discussed at length.

CONVEYANCE TO DEFRAUD, HINDER, AND DELAY CREDITORS is binding on the parties, and neither can set up against others the fraud on the creditors: *Nichols v. Patten*, 36 Am. Dec. 713; *Britt v. Aylett*, 52 Id. 282; and *Smith v. Grim*, 67 Id. 400, and notes, where other cases in this series are collected. And even creditors, in order to attack a sale on the ground of fraud, must prove their debts and pursue their claims to judgment and execution at law: *Meux v. Anthony*, 52 Id. 274, and cases collected in notes; *Miller v. Miller*, 39 Id. 597; *Sanford Mfg. Co. v. Wiggin*, 40 Id. 198.

THE PRINCIPAL CASE IS CITED IN *Lehmberg v. Biberstein*, 51 Tex. 462, to the point that a suit to cancel a deed, alleged to be in trust only, may be brought in the county where the defendant resides, instead of the county where the land is situated.

HIGGINS v. JOHNSON'S HEIRS.

[20 TEXAS, 389.]

LAND PURCHASED WITH COMMUNITY FUNDS IS PRESUMABLY COMMUNITY PROPERTY, though the deed is taken in the name of the wife.

PRESUMPTION THAT LAND IS COMMUNITY PROPERTY, though standing in the wife's name, may be overcome by proof that the husband, in having the property put in her name, intended to donate it to her.

CONVEYANCE TO WIFE OF LANDS PURCHASED WITH FUNDS OF HUSBAND is *prima facie* a gift from the latter to the former; but the presumption may be rebutted by proof that the purchase was for his own benefit.

PRESUMPTION THAT DEED TO HUSBAND IS CONVEYANCE TO COMMUNITY is much stronger than when the deed is to the wife.

CONVEYANCE FROM HUSBAND TO WIFE IS NOT FRAUD on parties subsequently becoming his creditors.

EXPRESSIONS IN *SMITH v. STRAHAN*, 16 Tex. 323, explained and modified.

CHAUNCEY JOHNSON and his wife Emily purchased land from the state of Texas in 1846. The patent was taken in the name of the wife. In 1852 Emily died, leaving several children. About 1850 Chauncey Johnson became heavily indebted, and after his wife died the land was sold under execution, and Higgins became the assignee of the purchaser. The heirs of Emily claimed the property, and Higgins brought suit against them. The judge charged that where property is purchased with the funds of the community, and the title is taken in the name of the wife, the presumption is that such property becomes part of the community, but that the husband could donate property to the wife; and if such was the intention of Chauncey Johnson in taking the patent in his wife's name, it would amount to a gift to her, and the land become her separate property. The jury found for the defendants, and plaintiff appealed.

G. W. Jones, and Oldham and White, for the appellant.

Hancock and West, for the appellees.

By Court, HEMPILL, C. J. But one question is presented in this case, viz.: Was the land in controversy a portion of the community estate of Chauncey Johnson? or was it the separate property of Emily, his wife? The certificate was conveyed and the patent issued to the wife; but the purchase being made by the husband, with community funds, and it being the *prima facie* presumption that a purchase, though in the name of the wife, is a portion of the common property, the question is, whether the declarations of the husband at the time of the purchase are such as to repel this presumption and amount to a gift to the wife.

If there were no such estate as that of community between husband and wife, the mere act of the husband taking a conveyance in the name of the wife would, on principles of equity, be deemed *prima facie* an advancement to the wife; and under our laws recognizing the rights of community, the presumption has been allowed in cases where the conveyance is to the wife, the purchase being made with the separate funds of the husband: *Smith v. Strahan*, 16 Tex. 814 [67 Am. Dec. 622].

Where the purchase money is advanced by one person but conveyance taken in the name of another, it becomes a question of intention whether the purchase is for the benefit of the grantee in the deed, or of the person who advanced the money.

The general rule is, that a trust results for the benefit of him who advanced the money: *Dyer v. Dyer*, 2 Cox C. C. 92; S. C., 1 Lead. Cas. Eq. 188. This is the *prima facie* presumption.

But there are exceptions to the rule as well established as the rule itself. For where the conveyance is in the name of the wife or of a child, the *prima facie* presumption is that the purchase is an advancement for the wife or child, rebutting the inference of trust for the husband or parent, which would have resulted to them had the deed been taken in the name of a stranger: 2 Story, 1204; Hill on Trustees, 135. All of these presumptions may be rebutted by parol evidence. The legal effect of deeds, as a general rule, is to vest the property in the grantee. And when this effect is varied by parol evidence—when it is shown that the deed is not the true expression of the intention of the parties, and that this may be inferred from circumstances outside of the deed—the intention is a fact to be established by proof; and presumptions of such intention, not being conclusive, may, on general principles, be rebutted by evidence to the contrary.

A conveyance to the wife of lands purchased with the funds of the husband is *prima facie* a gift from the latter to the former; but the presumption may be rebutted by proof that the purchase was for his own benefit.

Having glanced at the general rules with reference to the rights of parties, where the purchase is made by one but conveyance is in the name of another, let us examine the question more immediately presented for decision.

There is no doubt that where a purchase is made with community funds a mere direction by the husband to the vendor to execute the conveyance to the wife will not operate a change of estate, or convert community into the wife's separate property. The acquisitions of the joint or separate labor or industry of the partners become common property; and as a general rule, deducible from our former laws, property purchased during the marriage, whether the conveyance be in the name of the husband or the wife, or in the names of both, is *prima facie* presumed to belong to the community. This, however, is but a presumption, and may be rebutted by proof that the separate funds of either partner were employed in making the purchase; and if so, the property belongs to the one whose funds were employed in the acquisition; and provided also that the husband, in purchasing with his own means, takes the deed in his own name; for if this be in the name of the wife, the presumption will be that the property was intended for her, and not for himself. It will be perceived that a wide door is opened for the admission of parol evidence to explain and modify deeds taken under this system

during marriage. In fact, a deed of purchase taken in the name of the husband or of the wife has a twofold aspect or character. It may be a conveyance of separate or it may be a conveyance of common property, though, as a general rule, the purchase belongs to the community; and therefore arises the presumption that though the deed, upon its face, conveys a separate right to the husband or wife, yet the conveyance is in fact for the benefit of the community. The presumption that the deed to the husband is a conveyance to the community is, under ordinary circumstances, much more strong than when the deed is to the wife. The husband has the active dominion and control over the common property. He can alienate, exchange, or dispose of it without the consent of his partner in matrimony; and his acts, if not done with a fraudulent intent to her injury, will be good. He sells and purchases in his own name. Conveyances are rarely taken by the husband in the joint name of himself and wife, or in her name alone; and therefore, when made in the name of the wife, by the direction of the husband, the presumption that the property belongs to the common gains has not the force attached to it when arising upon a deed to the husband in his own name.

A deed to the wife is ordinarily but a deed to the community; yet as she may possess separate property, a conveyance of such property must be to her and in her own name. We have seen that a mere direction by the husband, when purchasing with common funds, to convey to the wife would not vest in her any separate interest. But in this case there was more than a mere order to convey to the wife. The evidence showed to the satisfaction of the jury, and we think pretty clearly, that the husband intended to make to her a gift of the certificate. He was apprehensive of trouble from old debts in New York, and, as he said, he wanted his wife to have something for the benefit of the family, and therefore the assignment to her of the certificate, and not to himself. If the purchase had been with his own money, the conveyance to the wife would of itself have been presumptive evidence of a gift. If made with community funds, will not the deed, under the direction of the husband and with the avowed intention of a gift, operate in the same way to convey the property to her in her separate right?

Is not, in both cases, the only question that of the intention of the husband? In the former, the law *prima facie* presumes the intent to favor the wife. In the latter, the *prima facie* presumption is for the community; but this is rebutted by the express

declarations of intention by the husband to make provision for the wife; and it is manifest that to secure this object he took the deed in her separate name. Is there anything in the fact that this was community property which would disable the husband from converting it by donation into the separate property of his partner in marriage? He had the control and disposition of the common property. He could sell without the consent of his conjugal partner, and could doubtless, as under our former laws, make such moderate donations to strangers as would not operate a fraud upon the wife. She has also dominion in the property, but during the life of the husband, it is not *in actu*, but *in habitu*. It is passive.

A husband vested with such enlarged control, even to the power of donation in a limited degree to strangers, has certainly authority to transfer the whole interest in an article of community property to the wife, as her separate, exclusive estate, she having already a passive though undoubted right to a moiety of the property.

Whether a transfer of the whole of the community property to the wife, with a view of fixing upon it the character of separate property, would be sanctioned, can be determined when the question arises. By sustaining the gift in this case, the order, arrangement, and control of property under the marriage relation is not materially changed. The husband is still the head of the community, with his power of disposition unabridged, except as to this land which he has placed beyond his control, and secured to his wife against the accidents of his debts or misfortunes.

The debts which are pressing the property were contracted long after the donation to the wife, and it cannot be set up that the conveyance was in fraud of their rights.

It is not without some hesitation that the court has attained the conclusion which it has reached in this case. We cannot be insensible to the fact that the admission of parol evidence to establish the intention of gift by the husband must offer facilities and temptations to fraud and perjury. This has been lamented by judges and courts; but such evidence has always been admitted in equity to enforce resulting trusts, and provisions for wives and children, which are exceptions to such trusts; and in this state such evidence is also admissible to establish parol trusts, as these are not prohibited by law; and in addition to these, we must, under our system of marital property, resort to such evidence frequently to ascertain whether conveyances

vest the property in the community, or in the partner named in such conveyances. On principle, it is not perceived why parol evidence may not be invoked to show the intention of the husband in having the deed of purchase with the common funds made to the wife; and if he intended a donation, why his intention should not have effect in the same way, and to the extent that his intention would be enforced provided the purchase had been made with his own funds; and particularly in a case where by the donation only a very moderate provision is secured to the wife.

There are some expressions in the opinion in *Smith v. Strahan*, 16 Tex. 323 [67 Am. Dec. 622], as to the effect of purchase in the name of the wife with community funds, which might lead, perhaps, to some misapprehension. That question was not before the court, and the remarks on that subject may be treated as *dicta*. In contrasting the effect of a deed in the name of the wife when the purchase was with common funds, with that of deed when the purchase was with the separate funds of the husband, it was intimated that the motives for taking the deed in the name of the wife in the former case could not affect the legal operation of the deed, as the community character of the property would not be changed. This was intended to refer, perhaps, to cases where the motives of the husband were not divulged. But if the rule went further, and intended to establish as a principle that in all cases a purchase with community money (though the deed be in the name of the wife), and irrespective of the declared motives of thus taking the deed, should be for the community, it must be regarded as modified by the rules and principles expressed in this opinion. There is no error in the judgment, and it is affirmed.

Judgment affirmed.

PROPERTY PURCHASED DURING MARRIAGE IS PRESUMED TO BELONG TO COMMUNITY, whether the conveyance be made to the husband or wife separately, or to them jointly. This presumption is very cogent, and can only be repelled by clear and conclusive proof: *Huston v. Curl*, 58 Am. Dec. 110, and note 112; *Love v. Robertson*, 56 Id. 41, and note 45.

VOLUNTARY CONVEYANCE FOR BENEFIT OF WIFE AND CHILDREN, if fair at the time, will be good against subsequent creditors of the person making the deed: *Hester v. Wilkinson*, 44 Am. Dec. 303; *Warren v. Brown*, 58 Id. 191, and note 196.

THE PRINCIPLE CASE IS CITED in *Dunham v. Chatham*, 21 Tex. 245; *Story v. Marshall*, 24 Id. 307, 308; *Smith v. Strahan*, 25 Id. 112; *Mitchell v. Marr*, 26 Id. 331; *Cooke v. Bremond*, 27 Id. 460; *Smith v. Bouquet*, Id. 513; *Tucker v. Carr*, 39 Id. 102; *Johnson v. Burford*, Id. 249; *Peters v. Clements*, 46 Id.

124, 125; *Baldrige v. Scott*, 48 Id. 189; *Veramendi v. Hutchins*, Id. 550; *Hall v. Hall*, 52 Id. 299; and *McCormick v. McNeil*, 53 Id. 22. to the point that where land is purchased with community funds and the deed is taken in the name of the wife, the presumption is that the land is community property; but such presumption may be rebutted by proof that it was the husband's intention to make the land the separate property of the wife. In such cases the transaction operates as a gift from the husband to the wife.

TOWNSEND v. SMITH.

[20 TEXAS, 465.]

ACTION OF DEBT ON JUDGMENT is properly brought in the county where the defendant resides.

LEVY UPON LAND IS NOT SATISFACTION OF JUDGMENT.

VOID SALE OF LAND UNDER EXECUTION is not a satisfaction of the judgment, where purchased by the judgment creditor, and afterwards recovered back by the judgment debtor.

JUDGMENT IS NOT AFFECTED BY EXECUTION SALE THAT PASSES NO TITLE, and after such a sale may be the subject of an action of debt, without a *scire facias* to revive it.

JUDGMENT BEARS EIGHT PER CENT INTEREST, regardless of the rate on the original indebtedness.

SMITH recovered judgment against Townsend, levied on land belonging to him, and sold it at sheriff's sale. Smith bid the land in for one thousand one hundred and eleven dollars. Townsend then brought suit in the United States district court, and recovered back the land; whereupon Smith brought this suit against Townsend on the judgment previously obtained, and claimed ten per cent interest, the rate on the original indebtedness, though the judgment did not express the rate of interest it should bear. Judgment for plaintiff, and defendant appealed.

Hamilton and Chandler, for the appellant.

Alexander, for the appellee.

By Court, WHEELER, J. This being in effect an action of debt on a judgment, and not a proceeding by *scire facias* to revive, the suit was rightly brought in the county of the defendant's residence.

A levy upon land is no satisfaction of the judgment. Nor does the sale and purchase of the land by the judgment creditor operate a satisfaction of the judgment, if by reason of any substantial defects in the execution or proceedings thereon no title passed to the purchaser. If the title to the land was not affected by the sale, the consequence is that the judgment debtor is the

owner of his estate, as before, and the judgment remains in force, unaffected by anything done under the execution. This seems clear upon principle, and is well settled by authority in point: *Tate v. Anderson*, 9 Mass. 92, 95; *Ladd v. Blunt*, 4 Id. 402; *Gooch v. Atkins*, 14 Id. 378. In the present case, then, it is clear there was no satisfaction of the judgment; for the defendant has actually sued for and recovered back the land by the judgment of a court of competent jurisdiction. It is thus conclusively established that the plaintiff acquired no title by his purchase, but the title remained in the defendant, as before the sale, and consequently the judgment remains in full force, unaffected by the sale. Surely it does not lie with the defendant now to say that the judgment was satisfied by the sale under the execution, when by reason of its nullity he has recovered back the land. Clearly a proceeding which was void, and conferred no right, cannot operate a satisfaction of the judgment; and it is not for the defendant to say the proceeding was not void, when he has so treated it in asserting and maintaining his title to the land.

The judgment not having been satisfied, the present action was well brought to revive it.

The computation of interest at ten per cent was error, for which the judgment must be reversed and the proper judgment here rendered.

Reversed and reformed. —

ACTION OF DEBT LIES UPON JUDGMENT AFTER EXTENT THEREUNDER, WHERE WRIT IS VOID, whether for defects apparent upon its face, or for defects of a character to be brought out only upon proof; nor does it vary the rule that possession has been taken under the extent, of which there has been no ouster: *Burnham v. Coffin*, 28 Am. Dec. 383, and note 388.

LEVY ON LAND IS NOT SATISFACTION OF JUDGMENT, and judgment lien continues unbroken: *Trapnall v. Richardson*, 58 Am. Dec. 333, and note to same 360, discussing the matter at length.

SATISFACTION OF JUDGMENTS AND EXECUTIONS BY LEVY ON REAL OR PERSONAL PROPERTY: See extended note to *Trapnall v. Richardson*, 58 Am. Dec. 350-363.

INTEREST IS ALLOWED UPON ALL JUDGMENTS obtained in Texas: *Finley v. Carothers*, 60 Am. Dec. 179.

THE PRINCIPAL CASE IS CITED in *Stone v. Darnell*, 25 Tex. Sup. 435, to the point that where defendant recovers back land sold in execution, the right of the plaintiff to have refunded to him the money he had paid is perfect; in *Heilbronner v. Douglass*, 45 Tex. 406, to the point that where a defendant's property is taken under attachment, he is entitled to a credit for it if not returned to him, even though it fall into the hands of third parties; and in *Cowanough v. Peterson*, 47 Id. 205, to the point that a levy on land is not a satisfaction of the judgment, unless followed by a valid sale.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

PAYNE'S ADMINISTRATOR v. PAYNE.

[29 VERMONT, 172.]

RECOVERY IN EJECTMENT BY EXECUTOR OR ADMINISTRATOR AGAINST HEIRS OR DEVISEES is conclusive against them in a subsequent action of ejectment for the premises by an administrator *de bonis non*, when the defendants show no right to the premises acquired subsequent to the rendition of that judgment.

HEIRSHIP MUST BE AFFIRMATIVELY SHOWN BY THOSE CLAIMING AS SUCH, and will not be inferred from the fact that they are brothers or sisters of the decedent.

EJECTMENT by Hunt, the administrator *de bonis non* of Albert G. Payne, deceased, for premises devised by him to his brother, Aaron H. Payne, who was also appointed his executor, and to the defendants Lucy Payne and Mahala Payne, his sisters. Verdict for the plaintiff, and exceptions by the defendants. The opinion states the case.

Aldis and Burt, for the defendants.

H. R. Beardsley and G. G. Hunt, for the plaintiff.

By Court, **ISHAM, J.** The premises described in the declaration were devised by the testator to Aaron H. Payne, Lucy Payne, and Mahala Payne, his brother and sisters, on condition that they gave to their parents, Samuel Payne and wife, a comfortable support during their natural lives. On the decease of the testator, the devisees were seised of the premises as tenants in common, subject, however, to have their title defeated by the non-performance of the condition mentioned in the will. The facts are found in the case that the defendants are in possession of the premises, and that Aaron H. Payne, the executor

named in the will, has been removed, and the plaintiff appointed administrator with the will annexed, in his place. On trial of the case before the jury, the plaintiff gave in evidence the record of a judgment in favor of Aaron H. Payne, as executor, against the defendants, in an action of ejectment for the recovery of these premises. That judgment was recovered long after the defendants had obtained their title under the will; for the will was proved in 1839, and the judgment was recovered in 1846. The estate of Albert G. Payne by that judgment obtained the legal title and right of possession to these premises, as against the defendants; for it was only on proof of such legal title and right of possession in the estate that the executor could have recovered in that action. The object of the action of ejectment in this state is not merely to recover the possession of lands, but to settle the title and establish the right of property, and the judgment when recovered is, as between the parties, conclusive evidence of that title: *Marvin v. Dennison*, 20 Vt. 663. Upon that evidence the plaintiff, as the administrator *de bonis non* of that estate, has, *prima facie* at least, the right to recover in this action; for under our statute he succeeds to the rights of the former executor, and can recover in an action of ejectment the premises wrongfully withheld from the estate.

It is quite obvious, upon the facts stated in the exceptions, that the defendants cannot justify their possession of the premises as devisees under the will. The judgment recovered by the former executor against these defendants will defeat their title as such devisees. It is evident that as such devisees they had neither the title nor right of possession as against the estate, for if they had either, that judgment could not have been recovered. If that judgment was obtained for the non-performance of the condition mentioned in the will, it will always conclude their rights as devisees, whatever may be their remedy in equity. The question, therefore, on whom rested the burden of proof to show that those conditions were or were not performed, does not arise in the case, as the right of the defendants to the premises was determined against them by that judgment. As devisees, therefore, after the rendition of that judgment, the defendants had no right to the possession of the premises.

It is contended, however, that this administrator has no right to recover these premises of those who are in possession as heirs, and who, on a distribution of the estate, are entitled to them, unless the premises are wanted for the payment of debts. We have no occasion to consider that question in this case, as we

perceive nothing in the exceptions which requires the application of that principle. There is nothing stated in the case showing that the defendants are in fact the heirs at law of Albert G. Payne. We do gather from the case that the testator and the devisees were brother and sisters, but it is only in one event that they become the legal heirs of the testator. That fact is not stated in the case, and it is one that must affirmatively appear before they can be clothed with that right. But if the fact appeared in the case, the difficulty is not removed. The recovery by the former executor establishes the right of the plaintiff, as administrator, to the possession of the premises. The same matters which gave the former executor a right to recover the premises will give the same right to the present administrator, as no attempt has been made to show a right to the premises acquired subsequent to the rendition of that judgment. If the premises were not wanted by the former executor for any other purpose but to distribute the same to the heirs, their possession of the premises would probably have been a defense to the action. The fact that a recovery was had is evidence that the executor had to the possession of the premises, as against the defendants, for some legal purpose. The judgment is evidence of the same right in behalf of the plaintiff as the administrator on that estate. Upon the facts stated in this case, therefore, we think the plaintiff is entitled to recover in this action.

The judgment of the county court is affirmed.

JUDGMENTS ARE CONCLUSIVE AGAINST PARTIES AND PRIVIES: *Detrick v. Migatt*, 68 Am. Dec. 584, and cases cited in the note 586; *Thomason v. Odum*, Id. 159, note 164; *Littleton v. Richardson*, 66 Id. 759. So of a judgment in ejectment: *Howard v. Kennedy*, 39 Id. 307; *Brown v. Taylor*, 37 Id. 618. It is conclusive of title upon parties and privies: *Parks v. Moore*, Id. 589; see *Drexel v. Man*, 44 Id. 195.

HEIRSHIP MUST BE PROVED other than by recitals in a deed of recent date, in order to furnish a foundation for title to land: *Potter v. Washburn*, 37 Am. Dec. 615.

HUNTOON v. DOW.

[29 VERMONT, 215.]

NOTES PAYABLE TO PARTNERSHIP TRANSFERRED BY PARTNER IN PAYMENT OF INDIVIDUAL DEBT cannot be reached by firm creditors on trustee process against the transferee; but if there was fraud in the transaction, a bill in equity is the proper remedy.

TRANSFER BY PARTNER OF NOTES DUE PARTNERSHIP IN PAYMENT OF INDIVIDUAL DEBT, at a time when the insolvency of the partnership was not known, does not indicate fraud.

TRUSTEE process against Jeremiah Dow as trustee of David B. Jones and Lucius Dow, who had been partners under the firm name of Jones & Dow. The firm had dissolved partnership, and at the time of their dissolution were indebted to the alleged trustee, who was the father of Lucius Dow, and also his individual creditor. Soon after the dissolution Lucius Dow, who was settling up the partnership business, indorsed to the trustee several promissory notes payable to the firm, which were to be applied, and were applied, upon the debts due him from the firm, and from Lucius Dow individually. Jones, when informed of the transaction, offered no objection, though he afterwards made the general claim that the partnership property should pay the partnership debts. He had, however, shortly before, with consent of Dow, applied to his own use notes of the firm to a larger amount than those appropriated by Dow to the payment of his individual indebtedness to his father; and Dow took these notes as an offset to those taken by Jones, and charged them to himself upon the firm books. He indorsed them to himself in the firm name, and then to the trustee in his own name. The firm was insolvent at this time, but was not generally so considered until some time afterwards. The amount realized by the trustee on the notes, which amounted to about three hundred and sixty dollars, exceeded his claim against the firm by a little over eighteen dollars. The county court held the trustee not chargeable, and the plaintiff excepted.

E. Edgerton, for the plaintiff.

E. Fisher, jun., for the trustee.

By Court, REDFIELD, C. J. In regard to the liability of the trustee, it was held in *Barker v. Esty*, 19 Vt. 131, that he could only be held liable for such credits as he held of the principal debtor in a fiduciary relation, and which were intrusted to him by way of contract, express or implied, to restore the same to the principal debtor.

Now, there is no possible ground of claiming any such liability here. The claim in argument is put upon the ground, if we correctly understand the counsel, that it was a virtual fraud in the trustee to accept of these partnership notes upon his individual debt. But it seems to us the evidence of any such fraud is slight indeed. It certainly was not known at the time the trustee took the notes that the partnership was insolvent. And all but about eighteen dollars of the money collected by the

trustee has gone to liquidate what were originally and equitably the partnership liabilities; and in regard to that, there is not the slightest ground of claim that any fraud was intended or committed. And the idea that the eighteen dollars was applied to individual debts in bad faith is highly improbable.

But if the proof of fraud were more satisfactory, we do not think the fraud could be reached by the creditors in this mode. It should be done by some proceeding which would settle the whole matter as to all concerned. This could only be done in a court of equity.

The legal title to the notes passed by the indorsements to the trustee. And this, being a species of property passing from hand to hand by delivery, cannot be pursued and recalled except in a court of equity, even if a trust could be attached to it; so that upon both grounds we think the trustee is not liable here.

Judgment affirmed.

GARNISHMENT REACHES ONLY LEGAL RIGHTS OF DEFENDANT: *Roby v. Labuzan*, 56 Am. Dec. 237. The garnishee must have in his possession "property, effects, or credits" of the defendant, or be indebted to him: *Smith v. Davis*, 60 Id. 390; *Carson v. Allen*, 54 Id. 148.

EXISTING PARTNERSHIP MAY MAKE BONA FIDE DISTRIBUTION of partnership funds among its members, or change them from joint to separate estate: *Allen v. Center Valley Co.*, 54 Am. Dec. 333. But a transfer of partnership property in satisfaction of an individual debt after the failure of the firm is fraudulent and void as to firm creditors: *Yale v. Yale*, 33 Id. 393; see *Goddard v. Hapgood*, 60 Id. 272.

MCDANIELS v. BANK OF RUTLAND.

[29 VERMONT, 230.]

ACCEPTANCE OF AMOUNT OFFERED OPERATES AS SATISFACTION OF DEBT when the sum in controversy is unliquidated, and the party offering attaches to his offer the condition that the sum, if taken at all, must be received in full satisfaction of the debt, even though the party receiving the money in so doing declares that he will receive it only in part payment; and this is the rule in equity as well as at law, unless there exists some special equitable ground of relief therefrom.

OFFER OF CERTAIN SUM IN SATISFACTION OF UNLIQUIDATED CLAIM does not operate as a legal tender if refused.

SURPRISE IS NOT GROUND FOR RELIEF IN EQUITY UNLESS ACCOMPANIED WITH FRAUD.

IGNORANCE OF FACTS, OF WHICH IGNORANCE PARTY WAS AWARE, does not constitute a mistake of facts.

EQUITY WILL NOT RELIEVE ON GROUND OF IGNORANCE OF FACTS which the party could have ascertained by the exercise of due diligence.

EQUITY WILL NOT RELIEVE FROM ACT DONE UNDER MISTAKE OF LAW and advice of counsel, unless there is some additional ground for equitable relief.

BILL by McDaniels against the president, directors, and company of the Bank of Rutland, praying that the defendants be decreed to pay the amount due on certain notes, or in default thereof be foreclosed of their equity of redemption of premises mortgaged to secure the notes. The notes and the mortgage securing them were held by the plaintiff, and had been executed by one Reed, who had quitclaimed the mortgaged premises to the defendants. Before the execution of this deed by Reed he and the complainant had had some transactions concerning the payment of the principal and interest, and the indorsements upon the notes showed that the whole amount of interest had been paid upon them up to the twenty-sixth of April, 1836, and on one of them up to the twenty-sixth of April, 1839, though, the bill alleged, no part of the interest was paid which accrued before the twenty-sixth of April, 1835, and therefore this interest was due when the defendants took the premises; and the bill explained at length the agreements between Reed and the complainant, and the mistake in the indorsements of interest. An answer was filed and traversed, and testimony introduced. The court dismissed the bill, and the complainant appealed. The case is in other respects sufficiently stated in the opinion.

W. H. Smith and E. Edgerton, for the orator.

S. H. Hodges and O. L. Williams, for the defendants.

By Court, **ISHAM, J.** The question in this case arises, whether the mortgage deed upon which this bill of foreclosure is brought has in fact been discharged by payment of the debt to the plaintiff. If it has been discharged in that manner, the bill was properly dismissed by the chancellor; otherwise the plaintiff is entitled to a decree of foreclosure. In the case of *McDaniels v. Lapham*, 21 Vt. 222, it was held that at law this mortgage debt had been paid, and that the plaintiff had no lien on the mortgaged premises which would enable him to sustain the action of ejectment. The facts as they appeared in that case are substantially the same as they now exist; so that the inquiry arises, whether the principles governing the case are the same in equity as at law. It is admitted that on the tenth of April, 1847, Henry G. Lapham, as the agent of the Bank of Rutland, offered to the plain-

tiff at Bennington the sum of one thousand eight hundred and seventy-five dollars, in full satisfaction of the amount due on this mortgage debt. The plaintiff, it appears, refused to receive the money on those terms, and stated that as he had not the mortgaged notes with him, he did not know, nor had he the means of ascertaining, the amount due on them; but offered to receive the money and apply it on the debt, and if it was too much he would repay the surplus, but if not enough they must pay the balance. It is conceded that Mr. Lapham refused to deliver the money on those conditions, and that he then read to the plaintiff the written instructions which he had received from the bank, and repeatedly informed him that he could offer the money on no other terms than those expressed in that letter, and that if he received the money he must accept it on those conditions, and those only. The plaintiff took the money from the table, still asserting that it should be applied on the debt to that extent only, and under the advice of his counsel that the balance of his debt could be recovered if the money was not sufficient to pay it. It is now claimed that the sum of five hundred and ninety-two dollars and fifty-eight cents is still due on that debt after the application of that money, and among the exhibits is a computation of the notes, payments, and credits made by Isaac McDaniels, showing that balance as still due. The defendants in their answers deny that that balance or any other is due on those notes, and insist that the sum paid is equal to the amount due on them; and that the acceptance of it in any event is a discharge of that mortgage. In looking at the exhibit making that balance, we perceive that interest has been cast on the several notes of three hundred dollars each from the twenty-sixth of April, 1830, when on the back of the notes there is a regular indorsement of the interest to the twenty-sixth of April, 1836, and on one of them to April 26, 1839. The explanation of this matter as made in the bill is denied by the bank in their answer; and they state that assurances were given to them that the interest on those notes had been paid agreeable to the indorsements, at the time they took a deed of the land, and agreed to advance the money to pay off the plaintiff's incumbrance. This matter in controversy involves a sum nearly equal to the amount now claimed as the balance due on those notes. The notes were also subject to a deduction for payments made by the maker, and particularly for rents and profits arising from the use and occupation of a portion of these mortgaged premises by the plaintiff. A statement of these matters is made in that exhibit. It is un-

necessary in this case to examine the merits of those claims, or the correctness of the exhibit and balance as there stated. It is sufficient that when the money was offered a controversy existed in relation to those matters; that the claims were of an unliquidated and uncertain character, and were proper matters for judicial investigation, as well as of compromise and adjustment. Under those circumstances, the rule at law was determined in the case of *McDaniels v. Lapham*, 21 Vt. 222, that "when a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and he attaches to his offer the condition that the sum, if taken at all, must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party at the time of receiving the money declares that he will not receive it in that manner, but only in part payment of his debt as far as it goes." The mere act of receiving the money is an agreement to accept the same on the conditions upon which it was offered. The same doctrine had been previously held in the case of *McGlynn v. Billings*, 16 Id. 329, and was subsequently recognized in the case of *Cole v. Champlain Transportation Co.*, 26 Id. 87. On this subject the rule in equity is the same as at law, and must necessarily govern this case, unless some special matter exists which renders it inequitable to give it that effect, and which entitles the party to relief from the operation of that rule.

As grounds for such relief, it is stated in the bill that the plaintiff had been defrauded by the defendants, and that the conveyance to the Bank of Rutland was made for that purpose, and without consideration; that in offering the money to the plaintiff at Bennington, they designedly and in fact did take an undue advantage of his situation and of his absence from his home and his papers; that he was surprised, and in accepting the money he acted without due deliberation, and under a mistake both of the facts in the case and of the law. If the facts stated are sustained by proof, we have no doubt as to the power and duty of the court to grant the relief prayed for in the bill. In relation to the charge of fraud and conspiracy, the case seems entirely destitute of any evidence to sustain it. When the money was offered, there were no false representations made to the plaintiff by the defendants, or any one acting in their behalf; neither was there any confidential relation existing between the parties from which there could arise any breach of confidence or

trust. The bill contains no charges of that kind; and yet most of the authorities read at the hearing of this case have their application to cases of that character. So far as the Bank of Rutland are concerned, the conveyance of these premises was made to them for the purpose of securing a debt due to them from the mortgagor; and their offer to the plaintiff of the amount which they regarded due on that mortgage debt was made in order to discharge an obligation which they had assumed upon themselves, and for the purpose of perfecting their own security. We see nothing on the part of the defendants in this particular but the exercise of legal and equitable rights in order to bring to a final termination a matter which had long been the subject of legal controversy. The case is equally destitute of any evidence showing that any advantage was designed or in fact taken of the plaintiff, by making that offer of the money at Bennington rather than at Danby. No advantage could arise from that circumstance. The plaintiff had the right to accept or refuse the money. If it had not been accepted, the offer would not have had the effect of a legal tender, as the conditions annexed to it, and the unliquidated character of the claim, would prevent that result. It would not have affected the plaintiff's lien on the mortgaged premises, nor his right of subsequent accruing interest. The plaintiff was not called upon to act under any possible forfeiture of rights, or any legal consequences of that character attending the result. He was not placed in any alternative of that character. He had only to refuse the money, and his rights would have remained the same as if the offer of the money had not been made. So far as the bill charges fraud in fact, and that an undue advantage was taken of the plaintiff in that transaction, the case seems wholly destitute of proof to sustain it. The case is also equally destitute of substantial reasons for relief on the ground of surprise. The plaintiff has not made that specifically the subject of complaint in the bill; but where that cause exists, relief may possibly be granted under the charge of actual fraud. In the *Earl of Bath and Montague's Case*, 3 Ch. Cas. 56, the lord-keeper observed that "the word 'surprise' is a word of general signification, so general and so uncertain that it is impossible to fix it. A man is surprised in whatever is not done with so much judgment as it ought to be. But those who use that word mean such surprise as is accompanied with fraud and circumvention. Such a surprise may be good ground to set aside a deed in equity, and hath been so in all times. But any other surprise," observes he, "never was, and I hope never will be." Such was the em-

phatic language of Lord Somers on that subject, and of that opinion was Lord Holt, Chief Justice Treby, and Baron Powell: 1 Story's Eq. Jur., sec. 251; 1 Fonbl., b. 1, c. 2, sec. 28; 1 Madd. Ch. 212. This case is not brought within the application of that rule; and we think relief should not be granted for that matter in cases which that rule does not embrace. The plaintiff, when he accepted that money, had his own time for deliberation; he advised with his friends, and consulted with counsel, who, as it is stated, advised him not to receive the money if the security was good; and, what is more decisive in the case, the plaintiff has not given up an undisputed right, or one which was not a litigated matter. Upon these grounds, therefore, we think the bill cannot be sustained.

The more important question in the case arises whether the plaintiff is not entitled to relief on the ground that the money was accepted under a mistake of fact and law. When the money was received, the plaintiff probably supposed he could recover the balance of his debt if the money offered was insufficient to pay it, and that his security on the mortgaged premises would be preserved for that purpose. His counsel so advised him. It cannot be said, however, that he acted under any mistake of fact in the case. He was ignorant as to the balance due on that mortgage debt; he so represented himself at the time the money was offered. The money was taken with the full consciousness of the want of that information. But, as it was observed by Lord Loughborough, and by Chancellor Kent in *Penny v. Martin*, 4 Johns. Ch. 567, "ignorance is not mistake;" *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287, "a mistake of fact is an error of opinion." The plaintiff had made no estimate of the amount due on those mortgaged notes, derived from a computation of the same, and which computation proved to be erroneous. If an estimate of the amount due had been formed under those circumstances, it might be said that the plaintiff acted under a mistake of fact. It is true, courts of equity will grant relief for ignorance as well as for a mistake of fact; but the principles on which relief is granted in those cases are very different. When the party has acted in ignorance of facts merely, courts of equity will never afford relief where actual knowledge could have been obtained by the exercise of due diligence and inquiry. That was the very point determined in the case of *Penny v. Martin*, 4 Johns. Ch. 567. Justice Story has also observed, 1 Eq. Jur., sec. 146, and note, that "it is not sufficient that the

fact is material; but it must be such that he could not by reasonable diligence get knowledge of when he was first put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence." In relation to the amount due on these notes, the plaintiff had as great, and even greater means of knowledge than the defendants. The notes were under his control, and subject to his order; and he must have known with greater certainty the amount which had been paid upon them. With reasonable diligence and on inquiry, he could have ascertained the amount which he considered due on those notes, and if he assumed to receive the money on the offer that if accepted it must be in full satisfaction of the mortgage debt, he is bound by the conditions imposed. Under such circumstances, there is no mistake or ignorance of fact from which equity will relieve, even if upon a subsequent computation a larger sum is claimed.

The plaintiff, however, in accepting the money, was not aware that he would legally be bound by the conditions under which the money was offered, or that in its effect it would operate as a satisfaction of the mortgage debt. His mistake in this particular was purely one of law, and disconnected, as we have seen, from any fraud, undue advantage, surprise, mistake, or ignorance of fact, or any other consideration which equity ordinarily regards as a just foundation for relief. The general rule on the subject of relief for a mistake in a matter of law is given in Fonbl., b. 1, c. 2, sec. 7, and note, "that ignorance of the law will furnish no excuse for any person; it will not affect agreements nor excuse from the legal consequences of particular acts;" and Justice Story has remarked, 1 Eq. Jur., sec. 111, that in that rule "he is fully borne out by the authorities." It is quite obvious, however, that there are many cases in which a party has been relieved from the consequences of acts which have arisen from an ignorance of the law. It would seem that those cases were decided upon particular circumstances involved in them, rather than upon the application of general equitable rules. As observed by Justice Story, 1 Eq. Jur., secs. 137, 138, "the real exceptions are very few, and generally stand upon some very urgent pressure of circumstances. The rule itself is relaxed in cases where there is a total ignorance of title founded on a plain and settled rule of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, and surprise; but it may be safely affirmed, as a well-

established doctrine, that a mere mistake of law, unattended with any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity; and the present disposition of courts is to narrow, rather than to enlarge, the operation of exceptions." Without examining the various cases on this subject to which we were referred, it is sufficient to refer to the case of *Hunt v. Rousmaniere*, 1 Pet. 15, where the party acted under a mistake of law, and under the advice of counsel; and yet the court refused relief. In the case of *Bank of United States v. Daniels*, 12 Id. 32, this subject and the authorities were fully examined, and in that case the court observed: "That mere mistakes of law are not remediable is well established in *Hunt v. Rousmaniere*, *supra*; and we can only repeat what was then said, that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision." Those cases are regarded as having settled the doctrine in the courts of the United States. In England, in the case of *Stewart v. Stewart*, 6 Cl. & Fin. 964, Lord Cottenham has recently critically examined the authorities on this subject and came to the same conclusion, and his opinion was subsequently confirmed by the house of lords. In the case of *Pettes v. Bank of Whitehall*, 17 Vt. 444, the same doctrine was sustained in this state, and relief in equity was refused where a party acted under a mistake in law, and upon the advice of counsel. There is nothing in this case that takes it from the operation of this general rule; and unless we disregard the general current of both English and American cases, we think the plaintiff is bound by the act of receiving the money to the conditions upon which it was offered, and that in equity, as well as at law, the mortgaged debt must be regarded as compromised and discharged.

The decree of the chancellor is affirmed, with costs.

ACCORD AND SATISFACTION: *Rose v. Hall*, 68 Am. Dec. 402; *Jones v. Perkins*, 64 Id. 136, and note treating this subject 138-143; satisfaction of unliquidated demands: Id. 140, 141. The principal case is cited in *Calkins v. State*, 13 Wis. 395, to the point that the offer and acceptance of a sum less than the amount due constitutes a complete bar in all cases where there exists a *bona fide* controversy as to the liability or the amount due, or where the claims are of an unliquidated or uncertain character, and proper matters for judicial investigation as well as compromise and adjustment.

MISTAKE OF LAW, WHEN EQUITY RELIEVES AGAINST: *Pierson v. Armstrong*, 63 Am. Dec. 440, and cases cited in the note 450; *Dickerson v. Ripley County*, Id. 373, and note 380. There must be additional equitable ground

of relief: *Dill v. Shahan*, 60 Id. 540; *Champlin v. Laytin*, 31 Id. 382; *State v. Reigart*, 39 Id. 628; *Juzan v. Toulmin*, 44 Id. 448, and cases cited in the notes thereto; but see *State v. Paup*, 56 Id. 303; *Champlin v. Laytin*, *supra*.

MISTAKE OR IGNORANCE OF FACT, WHERE THERE ARE EQUAL MEANS OF KNOWLEDGE and no fraud appears, is no ground for equitable relief: *Robertson v. Smith*, 60 Am. Dec. 234; *Belt v. Mchen*, 56 Id. 329, and note.

GARRETT v. PATCHIN.

[29 VERMONT, 248.]

STATUTE EXEMPTING FROM EXECUTION "SUCH SUITABLE TOOLS AS MAY BE NECESSARY FOR UPHOLDING LIFE" exempts not only the shoe-making tools of one whose principal occupation was shoe-making, but who also carried on farming, and lived isolated, and did his own repairing of farming implements, but also such farming tools as are used by hand, and the simple tools necessary for the repairing of farming implements.

"NECESSARY," IN STATUTE EXEMPTING "SUCH SUITABLE TOOLS AS MAY BE NECESSARY FOR UPHOLDING LIFE," includes such convenient or useful tools as a man procures for his personal use, unless extravagant; and tools aggregating ten dollars in value are not extravagant.

"TOOLS," IN STATUTE EXEMPTING "SUCH SUITABLE TOOLS AS MAY BE NECESSARY FOR UPHOLDING LIFE," includes such farming implements as are used by hand, but not such as are used by means of oxen or horses, such as carts, plows, etc.

TRESPASS. The defendant attached an iron shovel, spade, dung-fork, three pitchforks, a scythe and snath, a potato-hook, hog-hook, common ax, broad-ax, adz, hatchet, and five augers belonging to the plaintiff, and comprising everything of this kind that he owned. These tools amounted in value to ten dollars and thirty cents. The plaintiff's principal occupation or trade was shoe-making, but he lived rather isolated, and did his own repairing of sleds, ox-yokes, etc. The question involved was whether the tools were exempt from attachment. Counsel for the defendant contended *inter alia* that only the plaintiff's shoe-making kit was exempt. Judgment for the plaintiff for the value of the tools attached, and exceptions by the defendant.

J. L. Stark, for the defendant.

A. B. Gardner and U. M. Robinson, for the plaintiff.

By Court, REDFIELD, C. J. The question here is, whether certain farming tools, as pitchforks, iron shovel, potato-hook, scythe and snath, spade, dung-fork, and common ax, and certain other tools, as adz, hatchet, broad-ax, augers, are exempt from attachment.

The statute is, that "such suitable apparel, bedding, tools, etc., as may be necessary for upholding life," shall be exempt from attachment and levy of execution. The term "necessary" in this connection has been construed to mean convenient or useful, and that has been deemed convenient or useful which a man procures for his own personal use, unless extravagant. And ten dollars in all for tools of this character could not be esteemed such, if they are of the character to which the statute refers.

The word "tools" in this statute has long been held to extend to such farming tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, dung-forks, and other tools of that character. But it is not to include machinery, or implements used by oxen and horses, as carts, plows, harrows, mowers and reapers, etc. We think this is the sound and reasonable construction of the statute.

And we see no reason why one who carries on farming to any extent, as this plaintiff did, should not have an adz, broad-ax, augers, and such simple mechanic tools exempt from attachment as are indispensable for repairing farming implements, and which he procures for his own use, and which he in fact uses as much as a mechanic. He is or may be compelled to perform such mechanical work in order to get along with his ordinary farming operations, and if so, he must have the tools, and should hold them exempt from levy of execution.

Judgment affirmed.

"TOOLS," IN EXEMPTION STATUTE, INCLUDES WHAT: *Whitcomb v. Reid*, 66 Am. Dec. 579; note to *Kilburn v. Deming*, 21 Id. 545; *Montague v. Richardson*, 63 Id. 173, note 176; *Healy v. Bateman*, 60 Id. 94, and note 96, collecting other cases; see *Quigley v. Gorham*, 63 Id. 139.

"NECESSARY," MEANING OF, IN EXEMPTION STATUTE: *Montague v. Richardson*, 63 Am. Dec. 173.

LYMAN v. EDGERTON.

[29 VERMONT, 305.]

NEGLECT OF TOWN CLERK TO INDEX RECORD FURNISHES NO CAUSE OF ACTION, under a statute making the town liable for damages accruing to any person from the neglect of the town clerk, unless it is the cause of the alleged injury, which must not result from the plaintiff's want of diligence; therefore it gives no right of action to one who never examined the records, and was therefore not misled by the omission.

FALSE REPRESENTATIONS OF TOWN CLERK AS TO RECORDS IN HIS OFFICE will not give right of action against town, under a statute making the

town liable for the neglect of the town clerk; but to hold the town liable for a defect in the records, the plaintiff must either examine the records, or prove a refusal of the clerk to permit him to do so upon request.

EXCUSE FOR MAKING REQUEST IS NOT PROVABLE UNDER ALLEGATION OF REFUSAL OF TOWN CLERK to show records upon request.

REQUEST TO TOWN CLERK TO SHOW RECORDS IS NOT PROVED by testimony that the plaintiff asked the clerk if there was any claim upon the property, and that he made the inquiry to avoid an examination of the records.

STATEMENTS OF TOWN CLERK RESPECTING RECORDS IN HIS OFFICE ARE NOT OFFICIAL ACTS, and if false, the town is not liable for the injury accruing therefrom, under a statute making the town liable for the neglect or default of the town clerk.

NEGLECT OF TOWN CLERK, WHETHER FRAUDULENT OR NOT, TO DISCLOSE EXISTENCE OF INCUMBRANCE upon premises to purchaser is not an official neglect for which the town is liable by statute.

ACTION on the case against Edgerton, town clerk, and the towns of Windsor and West Windsor. Verdict for the plaintiff. Motion in arrest of judgment overruled, and judgment for the plaintiff. The defendant excepted. The opinion states the case.

Washburn and Marsh, and W. Courier, for the defendants.

E. Hutchinson, and Converse and Barrell, for the plaintiff.

By Court, **ISHAM, J.** The questions in this case arise upon a motion in arrest of judgment for the insufficiency of the declaration, and upon exceptions allowed upon the trial of the case before the jury. The second count, on a former hearing of the case, was adjudged sufficient upon general demurrer, and is now regarded as sufficient upon this motion in arrest. If the plaintiff is entitled to an affirmance of the judgment on the second count, the motion in arrest is obviated; but if otherwise, the questions in the case arise on that motion, whether the facts stated in either of the other counts are sufficient to sustain the action.

The action is brought on that provision of the statute which renders towns liable for damages which have accrued to any person by reason of the neglect or default of their town clerk. It appears from the case that Edgerton was town clerk of Windsor, previous to its division by an act of the legislature, during the year 1835, and until March, 1839. In February, 1839, Edgerton and his wife conveyed to the plaintiff the premises referred to in the declaration by warranty deed. The same premises, it also appears, were included in a mortgage deed previously executed by them to George and Edward Curtis,

which was recorded at length upon the town records; but no index was made to that record until long after the sale of the premises to the plaintiff. The complaint in the second count is that Edgerton neglected, while town clerk, to make an index to the record of that mortgage, and that he also, after a request had been made, neglected to show the record of it, or to disclose to the plaintiff its existence. In the case of *Curtis v. Lyman*, 24 Vt. 338, it was held that this mortgage deed was sufficiently recorded to protect the title of the mortgagees, and that the plaintiff was charged with constructive notice of its existence, although in fact he had no actual knowledge of it until long after his purchase of the premises. In the cases of *Hunter v. Windsor*, Id. 327, and *Lyman v. Windsor*, Id. 580, it was held that it was the official duty of the town clerk to provide an index to that record, and to keep the same for inspection and use; and that, on request being made for that purpose, it was his duty also to submit the books of record in his office, and the index belonging to them, to the plaintiff's examination; and that for any neglect in these particulars the towns were responsible.

But to sustain an action of this character, it must appear that the neglect of the town-clerk was the cause of the injury, and that the want of such an index, or his neglect to submit the records of his office to the plaintiff's examination, is the reason why actual knowledge of the existence of the mortgage was not obtained. There is no ground of complaint for any neglect of official duty by the town-clerk when that neglect in no way contributed to the injury which the plaintiff has sustained. The principle applies to this case as well as to others, that the injury must not result from the plaintiff's negligence or want of proper diligence. In relation to the neglect of the town-clerk to make an index to that mortgage deed, the court properly charged the jury that "as the plaintiff never examined the records, and was not misled by that omission, they might dismiss that from the case, and in their deliberations treat the case the same as if the index had been duly made." The plaintiff having taken no exceptions to that charge, that rule must be regarded as binding. The declaration contains no averment, nor was there any pretense that an examination of the records was made or attempted. It cannot be said, therefore, that the want of an index was the reason why the plaintiff did not obtain actual knowledge that such a mortgage had been given. For that reason, the plaintiff can make no claim for that neglect of official duty.

In relation to the neglect of Edgerton to submit to the plaintiff's examination the records in his office, it may be observed that such a request is averred in this count; and if there had been any testimony proving that averment, the plaintiff would have been entitled to recover in this action. It does not appear from the case that the question whether a request was made to examine the records was a matter submitted to the jury. The case, on all the counts, was made to rest on the false representations of Edgerton that the premises were free from incumbrances; for the court instructed the jury that if the plaintiff omitted to make that examination of the records in consequence of the false information given by Edgerton, the want of such an examination would not preclude the plaintiff from a recovery. The effect of that charge is, that if those representations were made by Edgerton, it will dispense with the necessity of proving an examination of the records or of making any request for that purpose. But we think that doctrine cannot be sustained. So far as the towns of Windsor and West Windsor are concerned, no act of Edgerton will excuse the plaintiff from using those facilities or complying with those requirements for which express provisions are made by statute; and particularly it is necessary in this case to prove such a request, as such is the averment in this count. It is not competent to prove an excuse for not making such a request under an averment that an actual request was made.

But if we were to regard that question as submitted to the jury, and as now properly before us, the difficulty in the case is not avoided, as we think there is no evidence stated in the case tending to prove that for the examination of the town records a request was ever made by the plaintiff previous to his purchase of the premises. It is insisted that the case shows that such a request was made, and that the observation made by the plaintiff to Edgerton during the examination of the premises, that "you are town clerk, and can tell me—is there any claim upon this property?" is evidence tending to prove that fact. But we do not feel at liberty to put that construction upon that inquiry. It was obviously not so intended by the plaintiff, nor could it have been so understood by Edgerton. The testimony of the plaintiff, given on the trial of this case before the jury, which is detailed in the exceptions, has, we think, put this matter at rest. He says that "he did not go to the office at all," that "he should have considered it an imposition upon Edgerton had he proposed going there to examine the records, and that he made

the inquiry of him whether there was any claim upon the property to prevent going to look in the town clerk's office. The plaintiff did not consider that he had made such a request, and that the request had been denied; and we should not regard that language as evidence of a fact which the plaintiff himself disclaims. It is an obvious case, in which not only a request, but an actual examination of the records, was dispensed with, in the confidence placed by the plaintiff in the representations of Edgerton that the premises were free from incumbrances. It is true that the plaintiff has been injured in having been compelled to pay the Curtis mortgage; but that injury did not accrue from the neglect of the town clerk to make an index to that mortgage deed, nor upon request from the neglect of the town clerk to produce the records in his office for examination. On this count in the declaration, therefore, we think the plaintiff cannot recover, as he has failed to prove its material averments.

The questions on the motion in arrest of judgment arise upon the first, third, and fourth counts. We are to regard the facts stated in each of these counts as having been found by the jury on competent testimony. The third count, in common with all the others, contains the averment that Edgerton neglected to make an index to the record of the Curtis mortgage. It is then stated that, with a view to mislead the plaintiff, and thereby prevent him from making an examination of the records in his office, he represented that the premises were free from all incumbrances, except a lease to Dunbar and White; and that, in consequence of that representation, the plaintiff was induced to and did purchase the premises without any further examination or inquiry. There is no averment in this count that there was any request by the plaintiff, or refusal by the town clerk, to submit the records in his office to the plaintiff's inspection. The fact that no such examination was made or requested places the plaintiff in the same situation he would occupy if the Curtis mortgage had been recorded and an index to it duly made. The only inquiry, therefore, on this count arises whether the towns of Windsor and West Windsor are liable to the plaintiff in this action for those false representations of the town clerk, when in reliance upon them no examination of the records was made, in consequence of which his injury has been sustained.

The statute provides that towns shall be liable to make good all damages which shall accrue by reason of the neglect or default of any town clerk, etc. To ascertain whether there has been any such neglect or default, it becomes material to ascer-

tain the duties which are imposed upon the town clerk by law; for it is only for the neglect to perform official duties, or such as the statute requires, that towns are liable: *Hathaway v. Goodrich*, 5 Vt. 66; *Davis v. Clements*, 2 N. H. 390; *People v. Schuyler*, 5 Barb. 168. The statute, Slade's Comp. 414, provides that town clerks shall provide books with an index for registering deeds and other evidences respecting titles to lands, and also for recording the proceedings of town meetings and such other acts and things as are by law required to be recorded; and it is made his duty to record all such matters, to furnish copies of the same duly attested by him, and on proper request to show the records and files in his office. These are the specific duties enumerated by statute, so far as they are material to be now considered. It will be observed that the powers and duties of the town clerk are confined to making truthful records of all matters left with him which by law are to be recorded, to duly exemplify copies of the same, and to keep and preserve them for public use and inspection.

The intention of the legislature and the policy of the act are obvious. It was their intention to provide a feasible method, which should be certain, and as solemn in its character as record evidence, by which all persons who are or may be interested in the title of real estate may ascertain its true condition and the incumbrances resting upon it. These records alone, so far as the liability of towns is concerned, are made the organs of information in relation to such titles; and purchasers, as well as those who are making advances upon its security, are bound to consult those records for their information, and not the man who, for the time being, holds the office of town clerk. It is the manner in which those records are kept and preserved which determines and measures the liability of towns. If for the protection and security of towns and persons interested the law has provided certain facilities, in the use of which actual knowledge of the title to real estate and its incumbrances may be obtained, it is reasonable to require that those facilities shall be used for that purpose, and that no liability shall rest upon the town if the party injured has neglected to improve them, or has relied for his security upon the covenants in his deed, or the representations of the town clerk, or upon any source of information other than those records. If the plaintiff in this case had examined the records, and for the want of an index had failed in obtaining actual knowledge of the existence of the Curtis mortgage, or if he had been refused the examination of them, the

town would have been clearly liable. There would then have been a neglect of official duty—a neglect of duties the performance of which was required by law. But in no case are the statements and representations of a town clerk regarded as official acts for which towns are liable, nor are they regarded as any evidence of what does or does not appear upon the records of the town.

In the case of *Hill v. Bellows*, 15 Vt. 727, it was held that a certificate of a town clerk that a person had not conveyed land is not evidence of that fact. Williams, C. J., observed: "The certificate of the town clerk is evidence of what is on record, but he is not a certifying officer as to what does not appear of record." The certificate was not evidence in that case, because it was not an official act; and if not an official act, it is not a matter for which in any way towns can be made liable. The intent with which such certificates or statements are made does not affect the case. A fraudulent intent will not render an act official which otherwise would not be so. In *Oakes v. Hill*, 14 Pick. 448, it was observed that "recording officers may make and verify copies of their records, and in doing so act under the obligation of their oath of office. Of the verity of such copies, their certificates are evidence. But it is no part of their duty to certify facts, nor can their certificates be received as evidence of such facts." If their certificates are not official acts, much less will be their verbal representations. In 1 Greenl. Ev., sec. 498, it is said: "If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he is not bound to record, his certificate, being extra-official, is merely the statement of a private person, and will, therefore, be rejected:" *Jackson v. Miller*, 6 Cow. 751; *Wolfe v. Washburn*, Id. 261; *Carter v. Stokes*, 1 Mau. & Sel. 599. The statute does not make it the duty of town clerks to answer such interrogatories, nor are they, so far as the liability of towns is concerned, authorized to make any such representations or statements; it is no part of their official duty. They must therefore be regarded as the statements or representations of a private person, and for which towns are not responsible. We think the facts stated in this count are insufficient to sustain this action.

The first and fourth counts are, for the reasons which have been stated in connection with the third count, regarded insufficient. The first count contains the averment that Edgerton neglected to disclose to the plaintiff the existence of a mortgage previous to the purchase of the premises; and that is the grave-

men of the count. The fourth count is similar to the first, with the additional allegation that the neglect to make that disclosure was with a fraudulent intent. If the representations of the town clerk cannot be regarded as official acts, his neglect to disclose facts within his knowledge cannot be regarded as such. The difficulty in sustaining these counts arises from the consideration that towns are liable only for some neglect or default in keeping the town records, and not for any representations of the town clerk, nor for his neglect to disclose facts within his personal knowledge. If the town clerk has made such representations, or has neglected to make such disclosures, they are personal considerations, the same as if done by any private individual; and for such matters towns are not responsible. Whether an action could be sustained against Edgerton for these statements, or for a fraudulent neglect to disclose the existence of that mortgage, is not a question arising in the case. It is sufficient to observe that the statute has imposed no such liability on towns. The fact that Edgerton was both grantor of the premises and town clerk we have not regarded as of any importance in the case, or as in any way affecting the legal principles involved in it. If that circumstance has any effect, it should have led the plaintiff to place less confidence in such representations, and to the exercise of greater diligence in the examination of the records, and in the use of all those facilities which the law has provided for his security as well as for the security of towns.

The result is, that the judgment of the county court must be reversed, and a new trial granted.

TOWNS, COUNTIES, OR MUNICIPAL CORPORATIONS ARE NOT LIABLE FOR NON-FEASANCE, MISFEASANCE, OR MALFEASANCE of their officers respecting their legal duties: *Lorillard v. Town of Monroe*, 62 Am. Dec. 120, and note 124; see note to *Wallace v. City of Muscatine*, 61 Id. 133; *Deane v. Randolph*, 132 Mass. 477.

BARNARD v. WHIPPLE.

[29 VERMONT, 401.]

TITLE OF PERSON UNDER WHOM BOTH PARTIES CLAIM NEED NOT BE PROVED.

RIGHT TO PEW CAN BE TRANSFERRED ONLY IN MANNER PROVIDED FOR TRANSFER OF REALTY.

LEVY OF EXECUTION UPON PEW AS REALTY TRANSFERS TITLE as against a prior assignment of a certificate of ownership thereof, recorded by the clerk of the society occupying the church, in accordance with the by-laws of the society, which provided for a transfer of pews in this way.

ENJOINMENT for a pew in a meeting-house. The plaintiff showed that one Williams had purchased the pew, and that an execution in favor of the plaintiff and against Williams had been duly levied thereon as real estate belonging to Williams. It was admitted that the defendant was in possession when this action was commenced. The defendant introduced a by-law of the congregational society which occupied the church. The by-law provided that the clerk of the society give to each purchaser of pews a certificate of ownership; that this certificate should be recorded, and when any owner of a pew should transfer it, the purchaser should return the transfer and take a new certificate, which should be in like manner recorded. The defendant then introduced a certificate of ownership issued to Williams, and by him before the plaintiff's levy assigned to the defendant, and by the latter left with the clerk of the society for record, and for the issuance of a new certificate to him. The jury, under the instructions given, found for the defendant. The plaintiff excepted.

J. Ward, for the plaintiff.

S. W. Porter and J. F. Deane, for the defendants.

By Court, **ISHAM, J.** As the plaintiff and defendants claim title under Luke Williams, they are not permitted to deny his title to the pew mentioned in the declaration. As between these parties, the title of Luke Williams need not be shown; and the party will prevail in this action who has the better right from him: *Brooks v. Chaplin*, 3 Vt. 281 [23 Am. Dec. 209]. The doctrine seems now well settled that the right to a pew in a meeting-house is to be regarded as real estate. At common law, such a right is an incorporeal hereditament. The freehold of the church is in the parson for the time being. In this country the title generally depends on statutes enacted to regulate this kind of property. In some instances the right is declared to be an interest in real estate, and in others an interest in personal property. In 1 Greenleaf's Cruise on Real Property, 44, it is observed, that "it follows, in the absence of any statute provisions, that this kind of property is to be considered as real estate in all cases arising under the statutes of frauds, or of conveyances, or of descents and distributions. The right is held subject to that of the proprietors to repair and alter the edifice for the purpose of more convenient worship." The same doctrine is sustained in 3 Kent's Com. 489; *Bates v. Sparrell*, 10 Mass. 828; *Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28. In the case

of *Kellogg v. Dickinson*, 18 Vt. 266, it was observed that "the right to a pew was unquestioned in this state, and that the property therein is considered as partaking of the character of real estate." The same doctrine was held in *Hodges v. Green*, 28 Id. 358. In all these cases it was held that while the house remains, the pew-holder may maintain ejectment, case, or trespass, according to the circumstances, if he be disturbed in his right.

The assignment of the certificate by Williams to Whipple of his right to the pew transferred no legal title. That right could be transferred only in the manner provided for the transfer of real estate. It possibly might be regarded as a contract of purchase, which a court of equity would decree to be specifically performed by the execution of a valid conveyance, not only as against Williams, but his attaching creditors having notice of that contract. The fact that the defendant was in actual possession of the premises is a circumstance which has been frequently held to be sufficient notice to third persons of the contract and claim under which the possession is held. But the claim is merely equitable, and which courts of equity alone can protect. The plaintiff, by the levy of his execution, has acquired the legal title, and at law the legal title must prevail over the equitable interest.

The judgment of the county court is reversed.

TITLE OF PERSON UNDER WHOM BOTH PARTIES CLAIM NEED NOT BE PROVED: *Miller v. Surls*, 65 Am. Dec. 592, and cases cited in the note 602.

NATURE OF PROPERTY IN PEWS: See *Shaw v. Beveridge*, 38 Am. Dec. 616, and note 617. The right to a pew is real estate in all cases arising under the statute of frauds or of conveyances, or of descents and distributions, and the owner may maintain trespass *quare clausum fregit*: *O'Hear v. De Goesbriand*, 33 Vt. 607, citing the principal case.

SPRAGUE v. SMITH.

[29 VERMONT, 421.]

TRUSTEES OPERATING RAILROAD FOR BENEFIT OF BONDHOLDERS ARE PERSONALLY LIABLE to owners of freight and to passengers, to the same extent as the company would be if operating the road, and in the same way lessees or mere intruders who operate the road are liable.

SELLING THROUGH-TICKET OVER CONNECTING LINES TO PASSENGERS does not render carrier liable for carriage of passengers beyond his own line; but he is liable for the through transportation of freight and baggage, *semble*.

CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE UTMOST CARE; but they are not liable for such perils as occur wholly without their agency, unless there is some want of care in escaping from the consequences of such perils.

CARRIER OF PASSENGERS IN HIS OWN CARS OVER CONNECTING LINES is liable as a passenger carrier throughout the route.

CARRIER OF PASSENGERS IN HIS OWN CARS OVER CONNECTING LINES is not liable for an injury occurring while the cars are upon a connecting line, and caused without his fault by the negligence or misconduct of the operatives of the connecting line, over whom he has no control, unless the connecting roads constitute a general partnership, or are consolidated in their interests.

ACTION on the case for damages for injuries received by plaintiff as a passenger, against Smith and others, who were trustees of the first-mortgage bonds of the Vermont Central Railroad Company, and when the company failed to pay the interest on the bonds, took possession of and operated the road. While operating the road, they had an agreement with the Northern New Hampshire Railroad Company, and with other companies having connecting lines between Vermont and Boston, under which the freight received by the Vermont Central was to be carried through to Boston in their own cars over the connecting roads, and a division of the freightage was to be made between them. When the cars of the Vermont Central were upon the track of the Northern New Hampshire, the latter company furnished engines and engineers. It was the custom of the Vermont Central to carry cattle over the connecting lines, to receive the full freightage, and to give way-bills or bills of lading, and when a full car-load of cattle was sent, to carry the owner or some other person to care for the cattle without additional charge, and accompanying each cattle train was a saloon-car for the use of such persons. The plaintiff had loaded a car-load of cattle, had paid the freightage thereon, and received a way-bill to Medford, Massachusetts, and was in the saloon-car of the cattle train when it stopped at a station on the Northern New Hampshire road. While waiting here for a passenger train to pass, a freight train of the Northern New Hampshire road was carelessly run into the rear end of the cattle train, striking the saloon-car in which was the plaintiff, who was seriously injured by the collision. The court charged that the defendants were liable. Verdict for the plaintiff, and exceptions by the defendants.

J. P. Kidder, and Peck and Colby, for the defendants.

W. Hebard, for the plaintiff.

By Court, REDFIELD, C. J. 1. The defendants are trustees for the benefit of certain bondholders of the Vermont Central railroad, and as such, assignees of the company. The first question made in the case is, whether the defendants are personally liable upon the contracts made by the operatives upon the road, or for their negligence or misconduct while they continue to operate the road and receive freight and pay for carrying passengers, for the benefit of the *cestuis que trust*.

It is well settled in practice and by repeated decisions that the lessees of railroads are liable to the same extent as the lessors would have been, while they continue to operate the road. Indeed, there can be no question, we think, that a mere intruder into the franchise of a railway corporation, who should continue to use it for his own benefit, would be liable to passengers, and the owners of freight who should employ him, to the same extent precisely as the company itself, while continuing the same business. Any other view of the liability of such intruder would be to allow him to allege his own wrong in his defense. And we can see no reason why the defendants are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees or any others exercising the franchise of the company for the time must be; that is, that they are the ostensible parties who appear to the public to be exercising the franchise of the company. It would be perplexing in the extreme to require strangers suffering injury through the negligence of operatives under the defendants' control to look beyond the party exercising such control. The party having this independent control is in general liable for the acts of those under such control, whether of contract or tort.

2. As the defendants were interested in the transportation of the freight, and took pay and gave tickets through, they are *prima facie* liable for the delivery at the point of destination.

But in regard to carrying passengers the rule is different, we apprehend. These through-tickets, in the form of coupons for each successive company, which are purchased of the first company, import no contract, ordinarily, to carry the passenger beyond the line of the road of the first company, so far at least as they are concerned. The baggage of passengers may come under the same rule in regard to conveying beyond the first company's line which freight does, as the same general liability exists. But through-passenger tickets are to be regarded as distinct tickets for each road, and unless the road check baggage through, it is questionable, perhaps, how far they are liable for losses beyond

their own limits. And the contract between the companies which commonly exists in regard to the division of the price of the through-ticket constitutes no such partnership, probably, as will render each company liable for the whole route. The first company is, in such case, looked upon as the agent of the other companies for selling their tickets, and the contract requires no different construction from one where the tickets of one company are sold at the stations of other companies: *Hood v. New York & N. H. R. R. Co.*, 22 Conn. 1; S. C., Id. 502; *Ellsworth v. Tortt*, 26 Ala. 733 [62 Am. Dec. 749].

And in the present case there seems to have been no ground to question that the extent of the defendants' contract would oblige them to carry the freight through as common carriers, which will make them liable for all injuries not caused by inevitable accident or the public enemy.

And in regard to the carrying the plaintiff as a passenger upon the freight train, in the saloon-car provided for that purpose, the contract for carrying will extend throughout the route, the same as that in regard to freight. The defendants throughout the route, and of course at the point where the injury occurred, owed, by virtue of their contract, to the plaintiff, the ordinary protection which is required of common carriers of passengers. But this is not the same as that which common carriers of freight stipulate for. All that common carriers of passengers stipulate for, in the common case of carrying passengers, is to exercise the utmost care that no injury befall those who intrust themselves to their custody. This does not include such perils as occur wholly without the agency of the carrier, unless there is some want of care in escaping from the consequences of such perils: *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 611 [28 Am. Dec. 488].

We do not perceive that this rule of liability could make the carrier of passengers liable for the act of a party over whom he had no control. If the act causing the injury were that of a servant or operative employed upon the train carrying the plaintiff, although such operative were furnished and paid by another company, as the engineer in the present case, the carrier is undoubtedly liable. So, too, if the injury is caused by the misconduct of other servants of the same carrier who is carrying the plaintiff while operating other trains, the carrier is liable. But he cannot be regarded as liable, we think, for all the acts of all the operatives of the companies over whose roads he carries the plaintiff, unless some connection between the roads of a char-

acter similar to that of general partnership, or the consolidation of their interests in the carrying business is shown, which was not done in the present case.

It would not be pretended that a carrier of passengers by coach is liable for a mere tort committed upon such passengers in the course of the transit, as by another carriage coming in contact with the carrier's vehicle, or by an assault of a stranger.

It may be true that while the defendants were carrying the plaintiff upon their own road they may be liable for an injury to him by reason of an intrusion of another carriage upon their track, since the law enforces upon them the duty of keeping their track clear. But in those cases where other companies have the right by law to run their carriages upon the track of the defendant's road, by paying toll, as is common in England, and not uncommon in this country, in point of right, although not done practically to any great extent, it has never been held that one company is liable to passengers carried by them for injuries happening through the fault of other companies while rightfully upon the same track, and without any fault on the part of the first company. This principle, it seems to us, must control the present case. The defendants' contract only bound them for the skill and diligence of their own operatives, and those under their own control: *Bridge v. Grand Junction R'y Co.*, 3 Mee. & W. 244; *Robinson v. Cone*, 22 Vt. 213 [54 Am. Dec. 67]; *Thoroughgood v. Bryan*, 8 C. B. 115.

The plaintiff knew before entering upon the defendants' train that he would be exposed to those perils. They are incident, of course, to all railway traveling, and especially upon roads with only a single track. And knowing that this train was to be carried over other roads, where the defendants had no exclusive control, he must have understood, or was bound to understand, that the common contract for carrying passengers would not indemnify him against such perils. He must, then, we think, look to the company having the control of those by whose negligence he was injured. These persons were no more under the control of the defendants than of the plaintiff, and there is no reason why the defendants should take the risk of their good conduct more than that the plaintiff should, unless they so stipulated.

Judgment reversed and case remanded.

LIABILITIES OF COMMON CARRIERS SELLING TICKETS or contracting for carriage over connecting lines: *Carter v. Peck*, 67 Am. Dec. 604, and note 606; *Fitchburg etc. R. R. Co. v. Hanna*, 66 Id. 427, and note 430, 431; *Hart v. Rensselaer etc. R. R. Co.*, 59 Id. 447, note 450.

PASSENGER CARRIERS ARE LIABLE FOR UTMOST CARE AND SKILL, but are not insurers against accidents: *Galena etc. R. R. Co. v. Fay*, 63 Am. Dec. 323, note citing prior cases 333; *Farish v. Reigle*, 62 Id. 666; *Frink v. Coe*, 61 Id. 141, note 146; *Gillenwater v. Madison & I. R. R. Co.*, Id. 101; see note to *Hegeman v. Western R. R. Corp.*, 64 Id. 521.

LESSEE OF RAILROAD COMPANY IS LIABLE FOR FAILURE TO KEEP AND RING BELL upon locomotive in compliance with the statute: *Linsfield v. Old Colony R. R. Corp.*, 57 Am. Dec. 124, and note 128. But in *Nelson v. Vermont etc. R. R. Co.*, 62 Id. 614, it is held that a railroad company is liable for the acts of its lessees; and see note 617.

RAILROAD COMPANY DOES NOT ASSUME DUTY TO PASSENGERS OF ANOTHER RAILROAD COMPANY by merely giving the latter permission to use its road; nor, it seems, by contracting to make its road safe for such passengers. The remedy of an injured passenger is against the company with whom he contracted: *Murch v. Concord R. R. Corp.*, 61 Am. Dec. 631. But a railroad company will be liable as a passenger carrier when cars of another company containing passengers are transferred to its road attached to the engine, and wholly committed to the supervision and control of its agents and conductors: *Schopman v. Boston etc. R. R. Co.*, 55 Id. 41.

LIABILITIES OF TRUSTEES, RECEIVERS, ETC., OPERATING RAILROAD.—Trustees in possession of a railroad under a mortgage are liable as common carriers: *Smith v. Eastern R. R.*, 124 Mass. 157, citing the principal case. A contract executed by the trustees of the mortgage bondholders of a railroad company binds the trustees personally, and action thereon cannot be brought against the company: *Chaffee v. Rutland R. R. Co.*, 53 Vt. 349, citing the principal case. Receivers running and managing a railroad are liable as common carriers: *Blumenthal v. Brainerd*, 38 Id. 408, citing the principal case. A receiver of a railroad is responsible individually for the careful and proper management of property, the management of which he has voluntarily assumed, and over which the court has no control, though he is protected where the property is under the control of the court: *Kain v. Smith*, 80 N. Y. 472, 473, citing the principal case. A contractor possessing and exercising the power of the railroad company over the road, for the purpose of its construction, and assuming its control, is primarily liable to the same extent as the railroad company: *Gardner v. Smith*, 7 Mich. 422, citing the principal case.

BAXTER v. BUSH.

[29 VERMONT, 465.]

TO SUSTAIN TROVER, PLAINTIFF MUST SHOW TITLE TO PROPERTY CONVERTED, either general or special, and a right to the immediate possession.

LESSOR MAY RECOVER IN TROVER VALUE OF CROPS CONVERTED BY LESSEE who has not paid the rent, under provision in lease that the lessor shall have a full lien on the crops of that year as security for the payment of the rent, since this provision gives the lessor the ownership of the crops until the rent is paid.

ONE MAY TRANSFER TITLE TO CROPS NOT THEN IN EASE, and which are to be grown upon the land; and the property will pass as soon as they are grown.

LESSOR'S TITLE TO CROPS UNDER LEASE, RESERVING TO HIM LIEN UPON THEM FOR RENT, is not affected by his taking, at the making of the lease, the lessee's note, with a surety, for the rent, or by his prosecuting an action upon the note; and he may sue in trover for the crops.

INFANCY OF LESSEE CONSTITUTES NO DEFENSE TO TROVER FOR CROPS CONVERTED, brought upon a provision in the lease reserving to the lessor a lien thereon for the rent; for his liability arises from tort, not from a breach of contract.

INFANT'S CONTINUING IN POSSESSION OF LEASED PREMISES during the year after he came of age is a ratification of the tenancy, and renders obligatory upon him the provisions of the lease.

TROVER for the value of crops raised on leased premises, brought by the lessor upon a covenant by the lessee in the lease to give the lessor "a full lien on the crops as security for the payment of said rent of sixty-seven dollars and fifty cents." The rent had not been paid. The crops were worth more than the rent. The defendant showed that he was a minor when the lease was made, and when the plaintiff demanded from him the crops. At the time of the execution of the lease the defendant gave his note for the rent, signed by himself and by his mother as surety. The plaintiff had brought suit upon the note, and had a suit then pending for the rent reserved in the lease. The court directed a verdict for the amount of the rent reserved in the lease, and interest. The defendant excepted.

Cooper and Bartlett, for the defendant.

J. P. Sartle, for the plaintiff.

By Court, **ISHAM, J.** The property for which this action is brought is the produce of a farm leased by the plaintiff to the defendant for the term of one year from and after the first of April, 1853. Its conversion by the defendant is not disputed. The questions arise whether the plaintiff has that interest or title to the property itself which will enable him to sustain the action of trover; and whether the infancy of the defendant constitutes a defense. To sustain the action, the plaintiff must show a title to the property converted, either general or special, and his right to the immediate possession of it. The lease contains the provision that the plaintiff shall have a full lien on the crops of that year as security for the payment of the rent of sixty-seven dollars and fifty cents. If this provision is sufficient to give the plaintiff a title to the crops, there is no doubt as to his right to recover to the extent of his lien, as it is conceded that their value is equal to the amount due for rent. In the case of *Paris v. Vail*, 18 Vt. 277, and *Smith v. Atkins*, Id. 464,

the lease contained the provision that the crops were to be and remain the sole property of the plaintiff as a lien and security for the payment of the rent, and for the performance of all the covenants and stipulations therein. There is no difference in principle between that case and the one under consideration. The plaintiff in that case was to have the sole property in the crops as a lien. It was only to that extent and for that purpose his sole right of property existed. In this case, also, it is a matter of express provision that the plaintiff is to have a lien for the same purpose. He has to that extent and for that object the sole ownership. It is a legal implication in this case, what was expressed in the other. The parties obviously intended that the plaintiff should be the owner and have the control of the crops until the rent for that year was paid, and in all stipulations of that character the intention of the parties should be the rule of construction. The doctrine is well settled that a party may transfer a title to crops, though not then *in esse*, and which are to be grown upon the land, and the property will pass as soon as they are grown. That was the very point determined in the cases of *Paris v. Vail* and *Smith v. Atkins*, above cited. The same rule is sustained in England and in other American cases, and applies not only to the produce of land, but to other cases of contracts where the property is not *in esse* at the time: *Grantham v. Hawley*, 14 Vin. Abr. 72; *Leslie v. Guthrie*, 1 Bing. 697; *Monkhouse v. Hay*, 8 Price, 269; *Langton v. Horton*, 1 Hare, 549; *Mitchell v. Winslow*, 6 Boston Law Rep. 347; *Lewis v. Lyman*, 22 Pick. 437. The principles and reasoning upon which that doctrine is founded are fully considered by the court in the cases of *Paris v. Vail*, *supra*, and *Smith v. Atkins*, *supra*, and to which, for that purpose, it is only necessary to refer.

In the case of *Brainard v. Burton*, 5 Vt. 97, it was held that a similar provision in a lease was merely an executory contract, and that the lessor acquired no general or qualified property in the crops before they were grown and delivered to him by the lessee. That case, however, is not now regarded as being sound in principle, and is virtually overruled by the cases of *Paris v. Vail*, *supra*, and *Smith v. Atkins*, *supra*.

The fact that at the time the lease was made the plaintiff took the defendant's note with surety for the rent has no effect upon the plaintiff's title to this property. He had a right to take the note, and also the additional security of a lien upon the crops grown upon the farm, and to pursue his legal remedies upon

each and all of them until satisfaction for the rent is obtained. It is not a lien created by law merely, but by the act and express stipulation of the parties.

The infancy of the defendant constitutes no defense to this action. It appears that he came of age in September, 1853, but continued in the occupation of the premises during that year. His conversion of this property was a tortious act. His liability in this case does not arise from any breach of contract, but for an unlawful appropriation to his own use of the plaintiff's property. In such cases infancy is no defense to the action of trover or trespass: *Green v. Sperry*, 16 Vt. 392 [42 Am. Dec. 519]. The fact, also, that he continued in possession of the premises during the year, and long after he came of age, is a ratification of the tenancy, and renders obligatory upon him the provisions of the lease.

The judgment of the county court must be affirmed.

LEASE PROVIDING THAT CROPS SHALL BE AT CONTROL OF LESSOR until sold makes them not subject to attachment for the lessee's debts: *Esdon v. Colburn*, 67 Am. Dec. 730, and note 733. Where the lease stipulates that the lessor is to have the general property in the crops, he may maintain trespass against the lessee if he sells them: *Gray v. Stevens*, 65 Id. 216, note 219. The lessor of land may stipulate in the lease that the crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid; and such provision is valid not only between the parties, but as to third persons also; but it was held that the lessor must be the absolute owner of the premises: *Cooper v. Cole*, 38 Vt. 191, citing the principal case.

INFANT MAY BE LIABLE IN TROVER: See *Towne v. Wiley*, 56 Am. Dec. 85; *Green v. Sperry*, 42 Id. 519; note to *Humphrey v. Douglass*, 33 Id. 183; see *People v. Kendall*, 37 Id. 240, note 242.

TO MAINTAIN TROVER, PLAINTIFF MUST PROVE PROPERTY IN HIMSELF and the right of immediate possession: *Ames v. Palmer*, 66 Am. Dec. 271, note 274. Trover by owner of special interest: *Harker v. Dement*, 52 Id. 671, note 678 et seq.

COBB v. HALL.

[29 VERMONT, 510.]

PART OF PURCHASE MONEY PAID ON PAROL CONTRACT FOR PURCHASE OF LAND cannot be recovered when the vendor is ready and willing to perform his part of the contract.

ASSUMPSIT to recover one hundred dollars paid by the plaintiff as part of the purchase price of real estate. The contract for the sale was oral. The defendant had prepared a deed and had tendered it to the plaintiff, and again tendered it at the trial.

Verdict for the defendant, and exceptions by the plaintiff to the charge of the court.

G. C. and G. W. Cahoon, for the plaintiff.

T. Bartlett, jun., for the defendant.

By Court, REDFIELD, C. J. The parties in this case both agree that the contract, being one concerning the title of land, and not reduced to writing, was within the statute of frauds. No question seems to have been made at the time, but the one hundred dollars was paid towards the agreed price of the land, and, under the charge of the court, the jury have found that there was no failure to perform the contract upon the other side by giving the deed as stipulated, and that no demand was made of the plaintiff in regard to executing his notes, or to whom they should be made payable, different from the contract. The jury must have found this in order to have given a verdict for the defendant under the charge.

The only question remaining in the case, then, is, whether the party paying part of the purchase money of an estate, when the contract is within the statute of frauds, may, at his election, and while the other party is ready and willing to perform on his part, recover it back.

This we understand to be in conflict with all the decisions upon the subject: *Shaw v. Shaw*, 6 Vt. 69; *Smith v. Smith*, 14 Id. 440.

It is the universal rule upon this subject that the party cannot recover in such case. The statute does not render the contract void, but only provides that no action shall be maintained upon it; but for all purposes of defense the contract is perfectly valid, as has been often decided in different forms of action. What is done under the contract, and in part performance of it, is perfectly valid; and the payment of part of the price in money is as much part performance of the contract as paying it in labor, as in the cases cited above; and it is none the less part performance because it is not such a part performance as will in equity take the case out of the statute. Equity does not regard this such part performance as to take the case out of the statute because the money at law is full compensation. But we are not to infer from this that the party may always recover the price paid. He may recover it in that class of cases where equity, for other reasons, will decree a conveyance; that is, where the other party declines to convey. If the other party is ready and willing to convey according to the contract, as in this case, there is no

occasion to go into a court of equity, or to bring an action for the price.

But where the other party refuses to convey, if possession has been taken under the contract, equity will decree a conveyance; and if no possession has been taken, the party may recover back what he has paid. But so long as the party agreeing to convey is ready and willing to perform, he is not liable to any action, either at law or in equity, for anything done under the contract.

Judgment affirmed.

VENDOR PAYING MONEY WITH PRIVILEGE OF REFUSING TO COMPLETE PURCHASE may recover the money paid in *assumpsit*, after election to refuse: *Johnson v. Evans*, 50 Am. Dec. 669, note 672 et seq., upon rescinding the contract. The vendee is entitled to the return of the purchase money, where the rescission is at his instance, and on account of the vendor: *Bryant v. Loftus*, 39 Id. 242; see *Stow v. Stevens*, 29 Id. 139.

THE PRINCIPAL CASE IS CITED to the point that a party to an oral contract for the purchase of land cannot refuse a conveyance, and recover the purchase money paid: *Day v. Wilson*, 83 Ind. 465. The principal case came again before this court, and is reported in 33 Vt. 233.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

ROBERTS v. ROBERTS.

[13 GRATTAN, 639.]

PARTY HAVING INTEREST IN PROPERTY ABOUT TO BE SOLD AT AUCTION has right to have it offered for sale under such circumstances as afford an opportunity for fair competition amongst all who may be disposed to buy. Doubts about the identity or title of the property may prevent prudent men from bidding, and are therefore enough to justify any one charged with the duty of making a sale in postponing the sale until such doubts may be removed and the danger of sacrifice avoided.

COMMISSIONER'S SALE OF LAND UNDER DECREE OF CHANCERY COURT will be set aside where made on a day so inclement that persons intending to bid for a part of the land are deterred from attending, and where there was but one bidder present who lived at the place, without weighing the evidence, which is conflicting, as to the sufficiency of the price at which it was sold.

IT IS NOT NECESSARY, ON OBJECTION TO COMMISSIONER'S SALE OF LAND, in Virginia, to ask that the biddings may be opened, by the offer of a substantial advance upon the price reported. The court will consider the objections to the sale, and confirm or set it aside as the merits of the case may require.

BILL for sale of land undisposed of by will of a decedent. A sale was decreed, and a commissioner appointed to make the sale. The sale was duly made by the commissioner, and his report rendered to the court. To such report exceptions were taken. The remaining facts appear in the opinion.

Patton, for the appellant.

Robinson, for the appellee.

By Court, **SAMUELS, J.** It is the right of every party concerned in interest in property, when about to be sold at public

auction, to have it offered for sale under such circumstances as afford an opportunity for fair competition amongst all who may be disposed to buy. Doubts about the identity or title of the subject to be sold may prevent prudent men from offering to buy, and are therefore enough to justify any one charged with the duty of making a sale in postponing the sale until such doubts may be removed and the danger of sacrifice be avoided: See *Rossett v. Fisher*, 11 Gratt. 492; *Goare v. Beuhring*, 6 Leigh, 585; 1 Lomax Dig. 425. Without going into an enumeration of the many causes for which public sales have been set aside, yet we see that many of them are founded on the principle that fair competition has been prevented, and sacrifice may have been incurred to the prejudice of those interested. This principle rules in cases of sales by auctioneers, executors, administrators, trustees, commissioners, and all others having authority to sell: 2 Rob. Pr., old ed., 65. Although the irregular action of the person making the sale may not always avoid it, still wherever the sale itself is allowed to stand, the delinquent in duty must make compensation to the party injured.

In the case before us a sale of land was made by a commissioner acting under a decree of the circuit court of Nelson county. It was the right of the appellees as well as of the appellant, the parties interested, to have the benefit of fair competition. Yet the sale was made on the third of December, 1853, a day which was so inclement, because of rain, that several persons who wished to attend were prevented by the weather from doing so. There is a conflict of evidence on the question whether the inclemency of the day was such as ought to prevent any one who might wish to do so from attending. There is no conflict, however, as to the fact that some persons did stay away who had intended to be there, some of whom wished to buy the land, or a part of it. There is, moreover, no conflict of evidence as to the fact that the appellant was the sole bidder; that the commissioner, the crier, and one other were the only persons drawn to the place in expectation of a sale; that the appellant, who became the buyer, and her brother lived at the place. The case before us differs from *Fairfax v. Muse's Ex'rs*, 4 Munf. 124, in this, that in that case there were five bidders present, including the plaintiff's agent and the defendant. In our case, but one bidder was present. In our case, besides the commissioner and crier, there was but one other person in attendance because of the expected sale, and that other had no intention to buy. In the case of *Fairfax v. Muse's Ex'rs*, *supra*, the report states that

a "considerable number" were there. In our case, persons who wished to attend were prevented by the weather from doing so. In the case of *Fairfax v. Muse's Ex'rs*, *supra*, it is not shown that any one staid away because of the cloudy and rainy day who desired to be at the place of sale. The marked difference in the facts of the cases, in my judgment, requires a difference in their decision. Seeing that the duty of the commissioner was plainly violated, that the sale reported in effect was one by private contract, the court should not go into an inquiry upon the conflicting evidence whether the price was a fair one.

It was said in the argument here that if the sale under consideration could be set aside at all, it could only be done by opening the biddings by the offer of a substantial advance upon the price reported; that this practice of the English chancery courts should be followed here in cases like this; and that the exceptions to the commissioner's report in this case for this reason should be disregarded. This objection, I think, is not well taken. The commissioner is the officer of the court, and acts under its supervision. His errors, when brought to the notice of the court, or appearing on the face of his proceedings, may be corrected. Such has hitherto been the practice in Virginia without question as to its propriety; its convenience and justice are manifest, and it should not be disturbed. In *Fairfax v. Muse's Ex'rs*, above cited, the chancery court in a summary way revised the action of its commissioners, and confirmed it; and this court upon appeal affirmed the decision of the chancery court.

I am of opinion to affirm the decree.

The other judges concurred in the opinion of SAMUELS, J.

LEE, J., absent.

Decree affirmed.

JUDICIAL SALES, WHEN SET ASIDE: See *Littell v. Zunk*, 36 Am. Dec. 415; *Shinn v. Roberts*, 43 Id. 636.

OBJECTION TO COMMISSIONER'S SALE OF REALTY must be made in the court of which he is the officer, and the court will consider the objections, and confirm or set aside the sale, as the merits of the case indicate; and if, in such ruling, the court commits error, the parties have a right of appeal: *Teel v. Yancey*, 23 Gratt. 698; *Kable v. Mitchell*, 9 W. Va. 508, both citing the principal case. In *Gaeme v. Cullen*, 23 Gratt. 287, the principal case is distinguished, the former being merely a controversy as to the application of proceeds of a sale, and not a contest as to the fairness of the sale.

RAMSEY v. RAMSEY'S EXECUTOR.

[18 GRATTAN, 664.]

NAME OF TESTATOR AT COMMENCEMENT OF OLOGRAPHIC WILL is not a sufficient signing of the will, unless it appears affirmatively from something on the face of the paper that it was intended as his signature, under Virginia statute which provides that will must be signed "in such manner as to make it manifest that the name is intended as a signature."

PROBATE of will. The opinion states the facts.

Bouldin, for the appellants.

R. T. Daniel, for the appellee.

By Court, DANIEL, J. The fourth section of the chapter on wills in the code of 1849, page 516, declares that "no will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless [it] be wholly written by the testator, the signature shall be made or [the will] acknowledged by him in the presence of at least two [competent] witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

On comparing this section, as it now stands in the code, with the corresponding section reported by the revisors (see report of revisors, page 624), it will be seen that the legislature have adopted the precise language of the revisors in all that relates to the manner in which the signature of the testator is to be made—the only departures in the section as enacted from the same as reported being that in the second clause the revisors refer to the will by the terms "the instrument," whilst the legislature use for the same purpose the demonstrative pronoun "it;" that whilst the revisors required that "the signature" should "be made or acknowledged," the section as adopted declares that "the signature shall be made or the will acknowledged" in the presence, etc.; that the legislature have inserted the word "competent" before the word "witnesses," and have substituted the words "attest and subscribe" by the word "subscribe" alone; and have also dropped from the section the last clause or sentence found in that reported by the revisors, declaring that "a will so executed shall be valid without any other publication thereof."

It will be further seen on looking to the report of the re-

visors, page 624, that in a note to the first clause of the section they say: "This conforms to the decision in *Waller v. Waller*, 1 Gratt. 454 [42 Am. Dec. 564], and is thought to be better than an arbitrary rule requiring the signature at the foot or end of the paper."

In *Waller v. Waller*, *supra*, the will was wholly in the testator's handwriting, and commenced: "In the name of God, amen. I, John Waller," etc. It disposed of all the testator's property, and was in all respects formal and complete, with the exception that it concluded, "In witness whereof, I have hereunto set my hand this — day of —, 1841. Signed and acknowledged in the presence of;" and that it was never attested by witnesses, nor further signed by the testator. This court reversed the sentence of the superior court of Henry admitting the will to probate. The substance of the opinions of the several members of this court, and of the decision, is succinctly and correctly stated by Judge Lomax in the third volume of his digest (new edition) at pages 39, 40. He says: "In the opinion delivered by Allen, J., with the concurrence of Baldwin, J., the principle of *Lemayne v. Stanley* [3 Lev. 1], in relation to olograph wills in Virginia, was much discussed. According to that opinion, the finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible either to prove or disprove it. The signing of a will, to be a sufficient signing under the statute, must be such as upon the face, and from the frame of the instrument, appears to have been intended to give it authenticity. It must appear that the name was regarded as a signature, and that the instrument was complete without further signature; and the paper itself must show this. Stanard, J., expressed no opinion, but concurred with the other judges in favor of reversing the judgment of the court below, which had admitted the instrument to probate as a will. Brooke, J., dissented. Cabell, P., said that the paper propounded as the will of John Waller bore upon the face of it internal evidence that he did not regard it as a final and concluded act. It was manifest from the paper itself that he intended something further to be done; that it should be signed and acknowledged in the presence of witnesses. He did not, therefore, intend that paper, which was not signed (by subscription) and acknowledged, to be his will. To that extent we may suppose there was an agreement of all the judges who concurred in the judgment of reversal which was rendered."

The difference between the opinions of judges Allen and Ca-

bell would thus seem to be that the former held no signing of an olograph will to be sufficient except when it appeared affirmatively upon the face or from the frame of the instrument that the signing was intended to be a signing to give authenticity to the paper; whilst the latter, without indicating whether he could or could not go to that extent, was of opinion that when it appeared from the face of the paper that the testator intended something further to be done (which intention he held was made apparent in that case by the presence of the *in testimonium* clause and the absence of any attestation by witnesses and of any subscription or further signature of his name by the testator, the paper ought not to be regarded as a final and concluded act. In the opinion of the former, the signing in the body of the instrument was from its nature an equivocal act, which required to be explained by some further evidence, apparent on the face of the paper, of the testator's intention thereby to authenticate it, before it could have that effect. Whilst the opinion of the latter went only to the extent of holding that when, in such case, the finality of the act was negatived by other internal evidence that the testator did not regard the instrument as a concluded act, the signature in the body of the will was not sufficient. And as Baldwin, J., alone concurred in the opinion of Allen, J., and Stanard, J., gave no reason for concurring in the judgment reversing the sentence, admitting the will to probate, whilst Brooke, J., dissented, the decision, it must be conceded, cannot be held as declaring any principle broader than that announced in the opinion of Judge Cabell. Still, when it is considered that the decision in *Lemayne v. Stanley*, 3 Lev. 1, though generally followed in England and in most of the states in the Union, where the act of 29 Car. II. has been adopted, has been regarded by some of the most learned and eminent elementary writers and judges in both countries as at war with the plain and obvious meaning of the statute, letting in many of the most serious evils which it was the design of the statute to avoid; that in order to cure these evils and to shut out all doubt as to the meaning, office, and force of the signature, it became necessary in England so to change the law by legislative enactment as to require that the "will shall be signed at the foot or end thereof;" that like enactments with the like end in view had been passed in New York and Pennsylvania; that the law upon the subject in this state (at least in respect to olograph wills) had been left by the cases of *Selden v. Coalter*, 2 Va. Cas. 553, in the general court, and *Waller*

v. *Waller*, 1 Gratt. 454 [42 Am. Dec. 564], in this court, in a most unsettled condition; that Judge Allen, in the course of his opinion in *Waller v. Waller*, *supra*, adverted to the recent statutory changes just mentioned; that he declared himself in favor of a rule requiring that the signature should be so made as that upon the face and from the frame of the instrument it should appear to have been intended to give authenticity to the paper, and argued to show that such a rule was preferable to a statute requiring the paper to be signed at the foot or end; assigning as a reason that the statute would be inflexible, whilst cases might arise of a signing at some other place, under such circumstances apparent on the face of the instrument as would be equally entitled to produce the belief that the signing was intended to authenticate the will; that the revisors in their note already cited, whilst referring to the case of *Waller v. Waller*, *supra*, also made evident allusion to the provision of the ninth section of chapter 26, 1 Victoria, requiring the will to be signed at the foot or end, and recommended the scheme which they reported as better calculated to attain the end in view—when due weight is given to these considerations, there arises, I think, a fair inference that the legislature, in requiring that the will shall be signed “in such manner as to make it manifest that the name is intended as a signature,” designed not merely to enact what had been decided in *Waller v. Waller*, *supra*, but to furnish a rule in respect to the signature, which, whilst it would have all the certainty of the British statute, would yet let in wills, which, though not signed at the foot or end, might be signed in such manner as to afford internal evidence of authenticity equally convincing.

This view is sustained by Judge Lomax in the recent edition of his digest. In commenting on the section of the code now under consideration, he says: “It now requires, in addition to what was expressed under the former law, that it shall be signed in such manner as to make it manifest that the name is intended as a signature. . . . This expression was probably inserted in approbation of the principle that was decided (but in which decision it may seem that there was not a unanimity of the judges) in the case before referred to, of *Waller v. Waller*, and to settle, as far as general expressions can settle, the law of particular cases, the doubts and difficulties in *Selden v. Coalter*, and which may often occur in cases of olograph wills. The design is probably the same in effect as that which the English statute requires when it says that ‘it shall be signed at

the foot or end thereof by the testator.' The manifest intention of the signature wherever placed being the rule of the Virginia statute; the signing at the foot or end being alone the index of the intention as the rule of the English statute of Victoria:" 3 Lomax Dig., 2d ed., 70, sec. 35. Whether in the effort to construe the words in question we look alone to their ordinary import and the context, or seek their interpretation in the state of the law existing at the time when the act was passed, and shown to have been brought to the notice of the legislature, and in the design which we thence deduce to have been contemplated by them, I think there is no serious difficulty in coming to the conclusion that the act recognizes no will as sufficiently signed unless it appears affirmatively from the position of the signature, as at the foot or end, or from some other internal evidence equally convincing, that the testator designed by the use of the signature to authenticate the instrument.

And as in the case under consideration the signing at the top alone, which from its nature is an equivocal act, is aided by no other evidence or explanation on the face of the paper, showing that such signing was used for the purpose of ratifying and authenticating the contents of the instrument, I am of the opinion that the requirements of the act have not been complied with, and that the circuit court erred in admitting the paper to probate.

I think that the sentence of the circuit court should be reversed, and probate of the paper refused.

The other judges concurred in the opinion of DANIEL, J.

Judgment reversed.

SIGNATURE OF TESTATOR MUST APPEAR FROM INSTRUMENT ITSELF to have been intended and regarded as a signature to render the instrument a valid will: See *Waller v. Waller*, 42 Am. Dec. 564, and note 571; sufficiency of signing of olographic will, see note to *Lagrange v. Merle*, 52 Id. 592, and cases cited therein, of which the principal case is one. In *Roy v. Roy*, 16 Gratt. 418, the court, in citing the principal case, hold that the name of a testator at the commencement of an olographic will is an equivocal act, and that it must affirmatively appear from the face of the paper to have been intended as a signature to have that effect.

HUNT v. COMMONWEALTH.

[12 GRATTAN, 757.]

OF TRIAL FOR LARCENY OF BANK NOTE OF CERTAIN VALUE, instruction that if jury believe from evidence that the party lost a note of such value, and that the same was afterwards found in defendant's possession, they ought to find the prisoner guilty, unless his possession of the note is explained, is error.

MERE POSSESSION OF GOODS WHICH HAVE BEEN LOST is not *prima facie* evidence of guilt, nor does it, of itself, raise the suspicion of guilt.

FINDER OF LOST GOODS DOES NOT COMMIT LARCENY simply because he retains property found, when he has general means, by the use of proper diligence, to discover the true owner. To constitute the retention of such goods a larceny, he must have known the owner at the time of the finding, or the goods must have been so marked that he could ascertain their owner, and must be appropriated to his own use at the time of the finding, with intent to take entire dominion over them.

INDICTMENT for larceny of bank note. The facts are stated in the opinion.

Willis P. Boccock, attorney-general, for the commonwealth.

No appearance for the prisoner.

By Court, ALLEN, P. The prisoner was indicted for stealing a bank note for the payment of twenty dollars, the property of Green Gore. The first count charges the stealing of a bank note for the payment of twenty dollars, without further description. The second count charges the stealing of a bank note on the Bank of the Valley of Virginia, issued at Winchester, in Virginia, dated the — day of July, 1853, for the payment of twenty dollars. On the trial the prisoner excepted to three instructions to the jury, given at the instance of the commonwealth's attorney.

By the first the court instructed the jury that if they believed from the evidence that Gore lost a bank note of the value of twenty dollars, and that the same was afterwards found in the possession of the prisoner, that then they ought to find him guilty, unless his possession of the stolen note is explained by testimony.

There is no statement of the facts which the evidence offered proved or tended to prove. But as the instructions were given, it must be taken that they were pertinent to the facts proved, or which the evidence tended to prove. And if they do not propound the law correctly, the prisoner may avail himself of the error, if prejudicial to him.

To constitute larceny of the kind set out in the indictment, there must be a taking *animo furandi*, and against the will of the owner. At one time it was supposed that if the finder of goods converts them to his own use with a full knowledge of the owner, it is not larceny, there being no trespass committed in obtaining possession. Lord Coke, 3 Inst. 108, says: "If one lose his goods and another finds them, though he convert them *animo furandi* to his own use, yet it is no larceny, for the first taking is lawful." So, he says, "if one find treasure-trove, or waif, or stray, and convert them *ut supra*, it is no larceny, both in respect of the finding, and also for that *dominus rerum non apparet ideo cujus sunt incertum est*." To the same effect is 1 Hale P. C. 506.

The precise effect of these propositions of Coke and Hale was considered in the case of *Regina v. Thurborn*, 5 Brit. Cr. Cas. 387; and it was there determined that if lost goods are taken originally *animo furandi*, that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them, but under such circumstances as to warrant the jury in finding that at the time of the appropriation the prisoner really believed the owner could neither find the chattel or be found himself, such appropriation is not larceny. But that lost goods, which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. This case was reviewed and approved in the subsequent case of *Regina v. Preston*, 6 Id. 357. In the last case it was held that where a bank note is lost, and is found by a person who appropriates it to his own use, the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it. If the original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to a larceny.

From these decisions, it appears, says the annotator, 2 Archbold's Criminal Practice and Pleading, Waterman's ed., 388, that a taking by finding in larceny may be classed under three heads: "1. Where upon the finding there is no intention to appropriate the thing found to his own use, but, on the con-

trary, the finder intends to restore it to the owner if he be found, but afterwards he disposes of it to his own use either before or even after he knows who the owner is, this is not larceny, because there was no *animus furandi* at the time of the taking; 2. Where the party finds goods that have been actually lost, or reasonably supposed by him to have been lost, and appropriates them with intent to take entire dominion over them, really believing then that the owner cannot be found, and he afterwards dispose of them to his own use, either before or even after he knows who the owner is, it is not larceny, because the taking, though not exactly innocent, was not punishable, and could not be made the subject of an action of trespass; 3. Where goods lost or supposed to be lost, as aforesaid, are found and appropriated with the like intent, the party at the same time knowing or reasonably believing that the owner can be found, this is larceny, whether the finder afterwards convert them to his own use or not." Under these rules, it is not enough that the party has general means by the use of proper diligence of discovering the owner. He must know the owner at the time of the finding, or the goods must have some mark about them, understood by him or presumably known by him, by which the owner can be ascertained.

Whether goods were actually lost, whether appropriated by the finder *lucri causa*, with intent to take entire dominion over them at the time, whether at the time he so acquires possession he knew the owner, or by some mark about them presumably known by him the owner could be ascertained, are questions entirely for the jury.

In the application of these rules, the judge, in the case first referred to, remarks that "questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the chattel, the place where it is found, or the nature of the marks on it."

From this, it appears that the mere possession of goods which had been actually lost does not furnish any conclusive or *prima facie* proof of guilt; of itself, it does not raise the suspicion of guilt.

The most honest man may be found in possession of a chattel proved to have been actually lost, but holding it with the intention of restoring it to the owner; and yet, according to the terms of this instruction, the mere possession under such circum-

stances raises the presumption of guilt, unless he can explain by testimony how his possession was acquired.

A man finding a chattel actually lost may instantly take possession thereof *animo furandi*; that is, with the intent to usurp the entire dominion over it, and in pursuance thereof does convert it to his own use. Such conduct, in a moral aspect of the transaction, may be as dishonest as to steal it; for although he may not know the owner, or there be nothing in the circumstances attending the place where it is found, or the marks thereon to indicate the true owner, yet he must be conscious that there was an owner, and he should use all proper diligence to trace him out. Yet, as the property was in fact lost and the owner unknown, and no marks existing to indicate who he is, such a taking *animo furandi* and conversion is not larceny, because there was no trespass in the taking, as the possession acquired could not be said to be against the will of the owner, under the reason of the rule given by Lord Coke, *Quia dominus rerum non apparet ideo cujus sunt incertum est*.

The instruction under consideration dispenses with all proof of the circumstances under which possession of goods which had been lost was acquired, the fact of ownership known to the finder at the time, or indicated by circumstances attending the finding or by marks on the property, and lays down the law to be that proof of loss by the owner and possession in a third person, whether the finder or not, amounts to proof of guilt, unless the possession is explained. The instruction furthermore holds that those circumstances amount to guilt, without reference to the question of intent; and in fact, takes from the jury the consideration of the question with what intent the possession was taken, the intent to steal laying at the foundation of the charge of larceny, and being a question entirely for the jury. The instruction furthermore assumes in the last clause that the note was stolen, thus passing upon the effect of the testimony instead of leaving it to be weighed by the jury. In all these particulars the instruction was erroneous, to the prejudice of the prisoner.

The second instruction, whether strictly right or wrong, depending on the facts in evidence, was immaterial. If the prisoner supposed there was a variance between the note alleged to have been stolen and the note described in the second count, he should have moved to have excluded it as evidence under that count, or to have asked for an instruction applicable to that count. But there being one count to which the objection

did not apply, and the instruction as asked for and given applying to both counts, the prisoner could not have been prejudiced by it.

I think the court erred in the first instruction, and for that error the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial.

The other judges concurred in the opinion of ALLEN, P.

Judgment reversed.

POSSESSION OF STOLEN PROPERTY, EFFECT AS EVIDENCE OF LARCENY.—Larceny is a crime usually committed in secret, and the state, in most cases, is necessarily compelled to resort to circumstantial evidence to effect a conviction of the thief. And the possession of the property shortly after the theft is the circumstance most usually relied upon. The effect of such possession has been a matter for the consideration of the courts on innumerable occasions. As a leading text-writer says: "The reported cases on this topic are in numbers enormous, and are exceptionally discordant; not two, but many differing views and shades of opinion appear in them." 2 Bishop Crim. Proc., 3d ed., sec. 739. Considerable confusion as to the state of the law in this regard is caused by the loose expressions used by courts in their decisions on the question. In many cases it is said that such possession raises a "presumption" or "a conclusive presumption" of guilt, or is "*prima facie* evidence" thereof, leading to the belief that such possession raises a presumption of law as to the guilt of such party, and some courts have even so decided. A presumption of law, however, establishes a certainty, and the better opinion seems to be that such is not the effect of the possession of stolen property, and that the evidence thereof is a matter for the consideration of the jury in the light of each particular case, and raises merely an inference of the fact of guilt of such person. A court may therefore properly instruct a jury to the effect that the possession by a party, of stolen goods, is a fact or circumstance from which his complicity in the larceny may be inferred. These rules are deduced from the bulk of the decisions, and are sustained by the later cases and the text-writers: *Id.*, sec. 740; 3 Greenl. Ev., 14th ed., sec. 31; Whart. Crim. Ev., 9th ed., sec. 758; *Fisher v. State*, 46 Ala. 717; *People v. Chambers*, 18 Cal. 382; *People v. Ah Ki*, 20 Id. 177; *People v. Gassaway*, 23 Id. 51; *People v. Antonio*, 27 Id. 404; *People v. Kelly*, 28 Id. 423; *People v. Mulvane*, 39 Id. 614; *People v. Rodondo*, 44 Id. 538; *People v. Gill*, 45 Id. 285; *People v. Getty*, 49 Id. 581; *People v. Hurley*, 60 Id. 74; *State v. Raymond*, 46 Conn. 345; *Tucker v. State*, 57 Ga. 503; *Brown v. State*, 59 Id. 465; *Comfort v. People*, 54 Ill. 404; *Water v. People*, 104 Id. 544; *Hall v. State*, 8 Ind. 439; *Clackner v. State*, 33 Id. 412; *Way v. State*, 35 Id. 409; *Smathers v. State*, 46 Id. 447; *Jones v. State*, 49 Id. 549; *Howard v. State*, 50 Id. 190; *Smith v. State*, 58 Id. 340; *State v. Arnold*, 12 Iowa, 479; *State v. Brown*, 25 Id. 561; *State v. Brady*, 27 Id. 126; *State v. Golden*, 49 Id. 48; *State v. Hessians*, 50 Id. 135; *State v. Richart*, 57 Id. 245; *Lewis v. State*, 4 Kan. 296; *State v. Cassaday*, 12 Id. 550; *State v. Ingraham*, 16 Id. 14; *State v. Merrick*, 19 Me. 398; *Commonwealth v. Millard*, 1 Mass. 6; *Commonwealth v. Bell*, 102 Id. 163; *Commonwealth v. Randall*, 119 Id. 107; *Gablick v. People*, 40 Mich. 392; *People v. Wilson*, 30 Id. 468; *Davis v. State*, 50 Miss. 80; *Forster v. State*, 52 Id. 695; *State v. Gray*, 37 Mo. 372; *State v.*

Oreson, 38 Id. 372; *State v. En*, 10 Nev. 379; *State v. Hodge*, 50 N. H. 510; *Knickerbocker v. People*, 43 N. Y. 177; *Stover v. People*, 56 Id. 315; *Goldstein v. People*, 82 Id. 231; *Gregory v. Richards*, 8 Jones L. 410; *Mimms v. State*, 16 Ohio St. 221; *State v. Bennett*, 3 Treadw. Const. 692; *Curtis v. State*, 6 Coldw. 9; *Wilcox v. State*, 3 Heisk. 110; *Yates v. State*, 37 Tex. 202; *McCoy v. State*, 44 Id. 616; *Thomas v. State*, 43 Id. 658; *Dreyer v. State*, 11 Tex. App. 509; *Faulkner v. State*, 15 Id. 115; *Schindler v. State*, Id. 394; *Price v. Commonwealth*, 21 Gratt. 846; *State v. Heaton*, 23 W. Va. 773; *Graves v. State*, 12 Wis. 591; *Crilley v. State*, 20 Id. 231; *Heed v. State*, 25 Id. 421; *Newbrandt v. State*, 53 Id. 89; *State v. Weston*, 25 Am. Dec. 46. Many of the cases under this head are obscure and uncertain, and express all varieties and shades of opinion on the subject. Cases in the same states, even, appearing on conflicting sides of the question. But it is believed that the above is the rule most generally expressed, especially in the recent cases. In *Ingalls v. State*, 48 Wis. 647, the court say: "The effect of such evidence was very ably discussed by the late Chief Justice Dixon in *Graves v. State*, 12 Id. 591; and more recently by Justice Orton in *State v. Snell*, 46 Id. 524; the rule to be derived from these cases, and which is sustained by the later elementary writers upon evidence in criminal cases, is that the possession of the stolen goods by the accused is evidence tending to prove his guilt, but is in no sense conclusive thereof, nor does it follow as a conclusion of law that the accused is guilty if he fail to explain his possession."

The courts have held that it is error to charge the jury that they should convict the accused upon mere proof of the possession of stolen property recently after the larceny, without any further proof than of the fact of the larceny: *People v. Levison*, 16 Cal. 98; *People v. Chambers*, 18 Id. 382; *People v. Ah Ki*, 20 Id. 177; *State v. Hodge*, 50 N. H. 510; 3 Greenl. Ev., 14th ed., sec. 31. So an instruction that the prisoner must prove his possession to be innocent to secure an acquittal has been held erroneous: *People v. Noregea*, 48 Cal. 123; *State v. Emerson*, 48 Iowa, 172; *State v. Hodge*, *supra*, the latter case containing an exhaustive discussion of the law on this point. The mere possession without any further proof, it has even been said, leaves a reasonable doubt on which the party is entitled to an acquittal: *State v. Merrick*, 19 Me. 398. The possession alone, it is held, in a large number of cases, raises no presumption either of law or fact, which the court may declare to the jury, but is only circumstantial evidence of guilt: *Henderson v. State*, 70 Ala. 23; *People v. Levison*, 16 Cal. 98; *People v. Chambers*, 18 Id. 302; *People v. Ah Ki*, 20 Id. 177; *State v. Raymond*, 46 Conn. 345; *Conkright v. People*, 35 Ill. 204; *Sahlinger v. People*, 102 Id. 241; *Belote v. State*, 36 Miss. 96; *Stokes v. State*, 58 Id. 677; *State v. Hodge*, 50 N. H. 510; *Ingalls v. State*, 48 Wis. 647; see also the dissenting opinion of Henry, J., to *State v. Jennings*, 81 Mo. 213, 214.

But on the contrary, and to the point that recent possession alone is sufficient to warrant a conviction in the absence of evidence or circumstances calculated to raise a reasonable doubt, and that the court should so instruct, see *Territory v. Casio*, 1 Ariz. 485; *Smith v. People*, 103 Ill. 82; *State v. Adams*, 1 Hayw. 463; *State v. Jennett*, 82 N. C. 665; 3 Greenl. Ev., 14th ed., sec. 31, and note; Burrill on Circumstantial Evidence, 446. In Missouri, the presumption arising from such possession is conclusive unless rebutted: *State v. Kelley*, 73 Mo. 608; *State v. Babb*, 76 Id. 501; *State v. Jennings*, 81 Id. 185, Hough and Henry, JJ., dissenting in each case. But see the discussion on this subject in *State v. Hodge*, 50 N. H. 510, where the court reviews the authorities, and holds that the instruction last mentioned should not be given, basing its

reasoning on the ground that the evidence raised merely an inference of fact, and that the jury is the judge of the weight thereof. In *People v. Titterton*, 59 Cal. 398, it is held that the determination of whether the possession of stolen property is strong evidence, or only slight evidence tending to show guilt, is a matter for the jury to pass on, and not for the court to determine. That recent possession unexplained warrants a strong presumption of guilt is undoubted, but that the court should so instruct is generally held to be erroneous, it being a matter depending on the weight of evidence, which should be left to the jury: See *People v. Ah Sing*, Id. 400, applying the same rule to cases of burglary.

The mere fact that stolen property was found in possession of the accused may always be given in evidence in a prosecution for larceny against him, but the strength of the inference depends on the circumstances surrounding each case: *Angleman v. State*, 52 Am. Dec. 494; *State v. Walker*, 41 Iowa, 217. To raise a strong inference of guilt, the possession of the prisoner must have been personal, recent, unexplained, and involving a conscious assertion by him of right of property. These matters will be further treated of.

Proof of possession of a part of a lot of goods may be submitted to the jury as evidence of larceny of the whole lot: *Commonwealth v. Millard*, 1 Mass. 6; *Commonwealth v. Montgomery*, 11 Met. 534. In *State v. Reynolds*, 87 N. C. 546, the question whether recent possession of money is evidence of larceny thereof was considered, but not decided; in *Commonwealth v. Montgomery*, 45 Am. Dec. 227; *State v. Buckley*, 60 Iowa, 471; *People v. Getty*, 49 Cal. 581, the matter was decided, and such possession held to be evidence, though the money was not identified, if taken in connection with the fact that before the larceny the prisoner had no money, but that after it he had large sums, for the possession of which he could give no proper account.

Possession must be Recent.—In applying the rule that possession of stolen property raises an inference of guilt, “due attention must be paid to the circumstances by which such inference may be weakened or strengthened, depending on the length of time intervening between the theft and the finding of the goods in the possession of the party accused. Upon an indictment for stealing from a dwelling-house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, it would raise a very strong inference of his having stolen them. But if they were found in his lodgings some time after the larceny, and his possession was unaccounted for, on proof of actual theft such possession would raise a probable inference of his guilt. But if the property was not found in his possession till months afterward, it would raise merely a light presumption, and would be entitled to little or no weight:” *State v. Rights*, 82 N. C. 677; *State v. Jennett*, 88 Id. 665; *Commonwealth v. Montgomery*, 45 Am. Dec. 227. A strong or probable inference is raised only in case the possession is so recent that the possessor could not well have come by the property otherwise than by stealing: *Foster v. State*, 52 Miss. 695; *Gregory v. Richards*, 8 Jones L. 410.

No definite time after the loss of goods before possession shown in the accused is settled on to raise the inference of guilt. The question is one for the jury: *McAfee v. State*, 68 Ga. 823; *State v. Hodge*, 50 N. H. 510. Where the goods are bulky or inconvenient of transmission, a greater lapse of time is allowed than if the articles were light and easily passed from one to another: *Jones v. State*, 26 Miss. 247; *Jones v. State*, 30 Id. 643; S. C., 64 Am. Dec. 175; *Davis v. State*, 50 Miss. 86. Where the proof disclosing a possession shows it to have had its origin and inception subsequent to the larceny, it is not such a possession as creates a strong presumption of guilt:

Heed v. State, 25 Wis. 421. But if the party having it claims it by purchase prior to the time of the theft, he may be called on to explain his possession, and there is a strong inference of guilt: *Queen v. Evans*, 2 Cox C. C. 270; *State v. Adams*, 1 Hayw. 463. The question as to what constitutes such "recent" possession has been continually before the courts, and the cases show varied instances where the property has been found in the possession of the accused after periods of from several hours to months and years; but no definite time can be fixed, each case depending on its own peculiar circumstances: *Rex v. —*, 2 Car. & P. 459; *Rex v. Adams*, 3 Id. 600; *Rex v. Partridge*, 7 Id. 551; *Regina v. Harris*, 8 Cox C. C. 333; *Regina v. Hughes*, 14 Id. 223; *People v. Kelly*, 28 Cal. 423; *People v. Swinford*, 57 Id. 68; *People v. Williams*, Id. 108; *People v. Hurley*, 60 Id. 75; *State v. Raymond*, 46 Conn. 345; *Sloan v. People*, 47 Ill. 77; *Comfort v. People*, 54 Id. 404; *Warren v. State*, 1 G. Greene, 106; *State v. Taylor*, 25 Iowa, 273; *State v. Merrick*, 19 Me. 398; *People v. Walker*, 38 Mich. 156; *Belote v. State*, 36 Miss. 96; *State v. Wolf*, 15 Mo. 168; *State v. Floyd*, Id. 349; *State v. Lange*, 59 Id. 418; *State v. Hill*, 65 Id. 84; *State v. Johnson*, 1 Winst. L. 238; *State v. Williams*, 9 Ired. L. 140; *State v. Jennett*, 88 N. C. 665; *State v. Reynolds*, 87 Id. 544; *State v. Bennett*, 2 Treadw. Const. 692; *Hughes v. State*, 8 Humph. 75; *Perry v. State*, 41 Tex. 485; *Beck v. State*, 44 Id. 430.

Possession must be Personal.—The possession of stolen property, to raise an inference of guilt, must be personal, and must involve a distinct and conscious assertion of property by the defendant: *Rex v. Mansfield*, 1 Car. & M. 142; *People v. Hurley*, 60 Cal. 74. Stolen goods found in an outhouse near which the accused was seen shortly after the larceny will not of themselves raise an inference of guilt as from recent possession: *Regina v. Hughes*, 14 Cox C. C. 225; *Knickerbocker v. People*, 43 N. Y. 177. The appropriation of lost goods to the finder's own use, where they bear ear-marks which would render it an easy task to find the owner, involves such an assertion of property as will render the possession of it an evidence of guilt: *People v. Getty*, 49 Cal. 581; *Bailey v. State*, 52 Ind. 462; but see *Walker's Case*, 28 Gratt. 976, citing the principal case, and *Commonwealth v. Randall*, 119 Mass. 107. In such case the concealment of the property will render the inference much stronger. Where one was charged with having obtained the property of another by threats, evidence that it was found concealed in the prisoner's house is admissible as going to show that he was conscious of having obtained it improperly: *State v. Bruce*, 24 Me. 71. That the inference of guilt may be drawn from a joint possession with others, see *State v. Raymond*, 46 Conn. 345; *Hall v. State*, 8 Ind. 439; *Turberille v. State*, 42 Id. 490; *People v. Whitson*, 43 Mich. 410.

Explanation of Possession.—The inference to be drawn from the possession of stolen goods is not one of law, but of probable reasoning, as to which the court may lay down logical tests for the guidance of the jury, but can impose no positive binding rule. It is therefore proper that the prisoner's explanation of his possession should also be given for the consideration of the jury. Where no explanation is made, there may be a reasonable doubt of guilt, and in such case it has been held that small proof, and even proof of good character, may outweigh the inference: *People v. Hurley*, 60 Cal. 74; *State v. Butterfield*, 75 Mo. 297; but see *State v. Kelley*, 73 Mo. 617; *State v. Merrick*, 19 Me. 398. Though some of the older cases, depending on laws which prohibited an explanation by the prisoner, hold otherwise, it is now conceded that if a prisoner has it within his power to make an explanation and he fails to do so, the inference of guilt therefrom is strengthened by his

failure to explain: *Rex v. Evans*, 2 Cox C. C. 270; *Rex v. Dibley*, 2 Car. & Kir. 818; *Jones v. People*, 12 Ill. 259; *State v. Brady*, 27 Iowa, 128; *State v. New*, 22 Minn. 71; *Sartorius v. State*, 24 Miss. 602; *State v. Brown*, 75 Mo. 317; *Dillon v. People*, 1 Hun, 670; *State v. Graves*, 72 N. C. 482; *Curtis v. State*, 6 Coldw. 9; *Castellow v. State*, 15 Tex. App. 551; *State v. Bishop*, 51 Vt. 318; *Burrill on Circumstantial Evidence*, 446. But by this it is not meant that the prisoner is bound to prove his innocent possession, and that the burden thereof is on him. The general rule applies here as well as elsewhere, that a man is innocent until he is proved guilty, and the burden of proving his possession to be unlawful and inconsistent with innocence is on the state. In many cases it is said that the burden of proof shifts, on proof of the larceny and of the unexplained possession of the stolen goods. The cases on this proposition are indistinct and discordant, and by many courts the doctrine is entirely discarded: 2 Bishop Crim. Proc., 3d ed., 742; see *Conkright v. People*, 35 Ill. 204; *Henderson v. State*, 70 Ala. 23; *People v. Levi-son*, 16 Cal. 98; *People v. Chambers*, 18 Id. 382; *People v. Ah Ki*, 20 Id. 177; *State v. Raymond*, 40 Conn. 345; *Sahlinger v. People*, 102 Ill. 241; *Belote v. State*, 36 Miss. 96; *Stokes v. State*, 58 Id. 677; *State v. Hodge*, 50 N. H. 510; *Ingalls v. State*, 48 Wis. 647; see also dissenting opinion of Henry, J., to *State v. Jennings*, 81 Mo. 213, 214.

It is said that the inference of larceny may be rebutted by counter-inferences indicating that the property was honestly obtained: *Grimes v. State*, 68 Ind. 193; *Shackelford v. State*, 2 Tex. App. 385; *Dixon v. State*, Id. 530; *Heath v. State*, 7 Id. 464; *Taylor v. State*, Id. 659. Possession by a letter-carrier of a bank note some months after it was lost in the mail may be reasonably accounted for by the mere assertion that he found it: *Rex v. Smith*, 3 F. & F. 123. So one charged with stealing may offer evidence that he obtained possession of the property by purchase: *Way v. State*, 34 Ind. 409. In some cases it has been held that if a man gives a reasonable account of his possession, the burden of proof is on the prosecution to show that such account is untrue; but that if the account is unreasonable, it lies on the accused to prove the truth of his account: *Regina v. Crowhurst*, 1 Car. & Kir. 370; *Davis v. State*, 50 Miss. 86; *Garcia v. State*, 26 Tex. 209. In Missouri, however, it has been held that, in the absence of rebutting evidence, a conclusive presumption of guilt arises from possession of stolen property: *State v. Kelley*, 73 Mo. 608; *State v. Babb*, 76 Id. 501; *State v. Jennings*, 81 Id. 185; Henry and Hough, JJ., dissenting in each case, and in the latter of which they say that such possession affords no presumption either of law or fact which the court may declare to the jury, but that it is only circumstantial evidence of guilt, and that the prisoner is not bound to explain his possession, but that the burden is on the state throughout. In rebutting the inference from evidence of recent possession of stolen property, the prisoner may go beyond such matters as tend merely to account for the possession. He may, if he can, prove an *alibi*, and show that at the time of the theft he was away from the place where it occurred: *State v. Sulney*, 74 Id. 390.

Other Facts, Taken in Connection with Possession of Stolen Property, will, of course, strengthen or weaken the inference, as the case may be. The cases of explanation of the possession at a remote time, and of other proof of honest acquisition of the property, as having the effect to weaken the inference, have already been mentioned. The declarations of the accused at the time of arrest or of reception of the property may be admitted to rebut the inference of guilt: *Rex v. Abraham*, 2 Car. & Kir. 550; *People v. Sander*, 104 Ill. 248; *People v. Dowling*, 84 N. Y. 478; *Leggett v. State*, 15 Ohio, 283; *State v.*

Daley, 53 Vt. 442. On the other hand, the inference is strengthened if the prisoner's explanation of his possession involves a falsely disputed identity, or other fabricated evidence: *Rex v. Dibley*, 2 Car. & Kir. 818; *Rex v. Evans*, 2 Cox C. C. 270; *Rex v. Burton*, Dears. C. C. 282; *State v. Bennett*, 2 Treadw. Const. 692; *Rex v. Crowhurst*, 1 Car. & Kir. 370; *Rex v. Wilson*, 26 L. J. M. C. 45. So, "if a party have secreted the property; if he deny that it is in his possession, and such denial is discovered to be false; if he cannot show how he became possessed of it; if he give false, incredible, or inconsistent accounts of the manner in which he acquired it; if he has disposed of or attempted to dispose of it at an unreasonably low price; if he has absconded, or endeavored to escape from justice; if other stolen property, or pick-lock keys, or other instruments of crime, be found in his possession; if he was seen near the spot at or about the time the act was committed; or if any article belonging to him be found at the place or in the locality where the theft was committed, at or about the time of the commission of the offense; if the impression of his shoes, or other articles of apparel, correspond with the marks left by the thieves; if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or officer of justice;—these, and all like circumstances, are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referable only to a criminal origin, and cannot otherwise be rationally accounted for:" *Wills on Circumstantial Evidence*, 57.

POSSESSION OF STOLEN PROPERTY AS EVIDENCE IN CASES OF OTHER CRIMES.—The possession of stolen property in itself raises no inference of any other crime than larceny of the property. Where the charge is burglary, the mere possession of the stolen goods, unaccompanied by other suspicious circumstances, is not *prima facie* evidence of the burglary: *Davis v. People*, 1 Park. Cr. 447; *People v. Ah Sing*, 59 Cal. 400; *Bryan v. State*, 62 Ga. 179; *State v. Reid*, 20 Iowa, 413; *State v. Shaffer*, 59 Ind. 290; *People v. Gordon*, 40 Mich. 716; *Stuart v. People*, 49 Id. 255; *Frank v. State*, 39 Miss. 705; *Jones v. People*, 6 Park. Cr. 126; *State v. Graves*, 72 N. C. 482; *Walker v. Commonwealth*, 28 Gratt. 969; but if the breaking is proved, it may amount to corroborative or collateral evidence of the crime: *Brown v. State*, 61 Ga. 311; *Smith v. State*, 62 Id. 663; *Knickerbocker v. People*, 57 Barb. 365; *Methard v. State*, 19 Id. 363; *Bruce v. State*, 12 Ohio St. 146. In homicide, such evidence is admissible to trace to the accused articles of property taken from the deceased: *Rex v. Burdett*, 4 Barn. & Ald. 1; *State v. Babb*, 76 Mo. 501; *Commonwealth v. Sturtivant*, 117 Mass. 122; *Williams v. Commonwealth*, 29 Pa. St. 102; *Howser v. Commonwealth*, 51 Id. 332.

THE PRINCIPAL CASE IS CITED to the point that lost property may be the subject of larceny, in *Tanner v. Commonwealth*, 14 Gratt. 635, and in *Walker's Case*, 28 Id. 976.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

WRIGHT v. YOUNG.

[6 WISCONSIN, 127.]

WHERE PARTY TO CONTRACT, WHOSE SPECIFIC PERFORMANCE IS SOUGHT, RESISTS the performance, and insists that he is not bound by the contract, no tender of the purchase money need be made before bringing suit.

WHERE MONEY PAID INTO COURT BY WAY OF TENDER IS WITHDRAWN under an order of the court, such withdrawal cannot affect the validity of the tender.

TENDER OF QUITCLAIM DEED, WITHOUT RELEASE OF DOWER OF WIFE of the grantor, is not a sufficient compliance with a contract by which the bargainor agrees to convey the entire estate in the land by a good and sufficient conveyance.

IF WIFE OF VENDOR REFUSES TO RELEASE HER DOWER IN LAND contracted to be sold by him, and the vendee is willing to take such title as the husband has to give, he may enforce the performance of the contract, and have an abatement of the purchase money in compensation for the right of dower left outstanding.

INCHOATE RIGHT OF DOWER OUTSTANDING IS DEFECT IN TITLE, and an incumbrance upon the estate, but its value is susceptible of accurate calculation.

APPEAL from the Milwaukee circuit court. The facts are stated in the opinion, and in the opinion on the former appeal reported in 65 Am. Dec. 303.

Browne and Ogden for the appellant.

Finch and Lynde, for the appellee.

By Court, COLZ, J. After the very full consideration bestowed upon this case when it was before this court at the June term, 1855, and the opinion then given, which is to be found sub

nom. Young v. Wright, 4 Wis. 144 [65 Am. Dec. 303], we do not feel called upon to enter at any length upon a re-examination of questions then determined respecting the rights and obligations of the parties to the written contracts set forth in the complainant's bill. We were then led to the conclusion, which subsequent argument and reflection have rather strengthened than weakened, that the contract was a fair and reasonable one, sufficiently explicit in its terms to show what land was intended to be sold, and such a contract as should be specifically performed. We stated that we could see no peculiar circumstances of hardship attending the sale which ought to prevent a performance of the contract; that the land appeared to have been sold for a fair price, and that the fact that it had, since the contract was entered into, become more valuable, was not a circumstance which ought to prevent a decree for a specific performance. We supposed that the power of attorney authorized Day to make a full and unconditional sale of the land, and that the written contract of sale was competent and adequate to bind the principal to make a good title to the land. It was undoubtedly with this understanding of the decision of this court that the circuit court of Milwaukee county entered the decree from which the present appeal is taken, directing and ordering that the complainant should pay to the clerk of that court, for the use of the defendant, the sum of eight thousand seven hundred and seventy-nine dollars and twenty-two cents (being the amount due the defendant on the contract for the purchase money of the lands), and that the defendant, within a given time, should execute and deliver to the clerk, for the complainant, a good and sufficient deed of the premises, with the dower of the wife released, and that in the event a valid release of the dower of the wife was not obtained, the case was to be referred to a court commissioner to take proof and report the value of the dower interest outstanding. It is admitted in a stipulation among the papers, signed by the counsel of the parties, that after the decree was entered in this court the appellant executed and tendered to the complainant a quitclaim deed, properly acknowledged, and that the money and note mentioned in the contract were demanded, but that the same were refused by the complainant on the ground that the deed was not signed by the wife. And it further appears from the record that a decree *pro confesso* had been entered in the cause March, 1854, and that in pursuance of the terms of this decree the sum of two thousand one hundred and seventy-five dollars was paid by the complainant into the court for the use

of the appellant, and that afterward, upon the appellant filing a petition in the circuit court asking that the decree of the circuit court should be set aside, and he be permitted to make defense to the suit, the circuit court ordered the decree *pro confesso* to be set aside upon the appellant's paying costs; and at the same time ordered that the complainant be permitted to withdraw his money from the court. Some question has been made as to the right of the complainant to withdraw his money once paid into court, and it has been contended that by such withdrawal, and the subsequent refusal to pay the purchase money when demanded, and to execute the contract, the complainant had forfeited all rights under it, and must in law be held to have discontinued his suit. We cannot adopt this view of the matter. We do not understand that a court of equity, even in the first instance, requires a tender of money to be made when, from the facts and circumstances of the case, it is apparent that a tender would be useless, and the receipt of the money refused by the opposite party. In this case the appellant has from the outset resisted a performance of the contract, and insisted that it was not binding upon him. Any tender to him while occupying this ground of defense would have been an idle ceremony. He would have had nothing to do with the money, and would not have compromised his rights by receiving it. This must be obvious to every one. Therefore, how could he have been prejudiced by the withdrawal of the money from court?

Again: it seems to us there is another very sufficient answer to be given to this objection. By the terms of the order permitting the appellant to come in with his answer, the complainant had leave to withdraw the sum of money paid in. This was a part of the order of the court—an order which it was entirely competent for the court to make. The appellant availed himself of the conditions of this order, and is in good faith as much bound by the conditions which were intended for the benefit of his adversary as by those which worked for his advantage. As to the other points, we are of the opinion that the complainant was not bound to accept the deed which was tendered by the appellant. That was a quitclaim deed, without the dower of the wife released. From the first, as already indicated, we were of the opinion that by the contract the bargainor had agreed to convey the entire estate in the land sold by a good and sufficient conveyance. Such is our understanding of this contract. The only difficulty we have had in the case was whether, if the wife should refuse to release her dower, and

the vendee should be willing to take such a title as the husband could give, there could be an abatement of the purchase money in compensation for the right of dower left outstanding. And to remove our doubts upon this point, a reargument of the case was ordered. In our investigations, we fell upon the case of *Clark v. Siever*, 7 Watts, 109 [32 Am. Dec. 745], in which the court held that an abatement of the purchase money under such circumstances could not be made; but that the bargainee must pay the consideration money, and content himself with such a title as the husband could give, or forego a specific performance of the contract, and bring his action at law for damages. We are not prepared to adopt the doctrine of this decision.

In the notes to the case of *Seton v. Slade*, 2 White & Tudor's Eq. Cas., pt. 2 (found in 70 Law Lib. 23), the English annotators state the rule when the purchaser seeks a specific performance of the contract, and the vendor has not the same interest in the estate as that which he had contracted to sell, or there is some deficiency in the quantity of it, as follows: "It may be laid down as a general rule, subject, however, to some few exceptions, that a purchaser may, if he choose, compel a vendor who has contracted to sell a larger interest in an estate that he has to convey to him such interest as he is entitled to, with compensation." They then quote from the opinion of Lord Eldon, in the case of *Mortlock v. Buller*, 10 Ves. 292, the following observation: "If a man having partial interests in an estate chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent to him afterward to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee choose to take as much as he can have, he has a right to that and to an abatement, and the court will not hear the objection by the vendor that the purchaser cannot have the whole." Lord Eldon held, however, that these well-settled principles had no application to the case then before him, and therefore left the plaintiff to his action at law. Justice Story, in his work on equity jurisprudence, vol. 2, sec. 779, lays down the doctrine upon this subject, and says: "The general rule (for it is not universal) in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for

any deficiency in the title, quantity, quality, description, or other matters touching the estate." See the cases referred to in the note to this section; *Nethrop v. Holgate*, 1 Coll. 204, 28 Eng. Ch. 203; *Waters v. Travis*, 9 Johns. 465. The above are but a few of the many cases which might be cited to show that a vendee may enforce a performance of a contract by compelling the vendor to give the best title he can, and have a just amount of abatement from the purchase money for the deficiency of title, or quantity or quality of the estate.

In the present case, there is nothing to show that the wife is unwilling to relinquish her right of dower in the premises, and we do not feel authorized from the proof to presume that to be the fact. She may be entirely willing to sign the deed and release her dower, upon being requested so to do by the husband; but if she should refuse to release her dower, we are unable to see any good or satisfactory reason for denying the complainant a proper compensation for the right of dower left outstanding. What argument can be advanced to show that an abatement or equivalent should not be made in this case, which would not be equally cogent and weighty in any case where the vendor's interest is less than what he professed to sell? Dart on Vendors, 501. There can be no doubt but the title of the vendee is defective, while the inchoate right of dower is left outstanding. If the wife should survive the husband, the vendee's title might be partially defeated by her taking a life estate in one third of the premises. In the case of *Shearer v. Ranger*, 22 Pick. 447, it was held that an inchoate or contingent right of dower was an existing incumbrance amounting to a breach of the covenant, which extends to all adverse claims "and liens on the estate conveyed, whereby the same may be defeated in whole or in part, whether the claims or liens be uncertain and contingent or otherwise:" Rawle on Covenants, 136 et seq., and cases cited by him. We therefore conclude that in the present case the vendee can enforce a performance of the contract, and take such a title as the vendor can give, and have an abatement of the purchase money for the right of dower left outstanding. Some question has been made as to whether the value of this dower interest could be accurately calculated. There can be no difficulty, however, in ascertaining what this reversionary interest is worth. In Davis & Peck's Mathematical Dictionary, and by Cyclopaedia of Mathematical Science, pp. 501, 502, formulas are given, by which the present value of an annuity can be calculated, which is to commence at the death of one individual

and terminate at the death of another. In Emerson's *Miscellanies*, pp. 96, 97, can be found a like formula. The interest of the wife in the estate sold being susceptible of calculation, we see no hardship in deducting the value thereof from the purchase money, if she is unwilling to relinquish her dower.

The decree of the circuit court is affirmed, with costs.

TENDER, WHEN NOT NECESSARY BEFORE ACTION FOR SPECIFIC PERFORMANCE: See *Young v. Daniels*, 63 Am. Dec. 477, note 486, where other cases are collected. A party to a contract is relieved from making a tender when the other party resists performance, and claims that he is not bound by the contract: *Potter v. Taggart*, 54 Wis. 401, citing the principal case. Want of tender before suit brought does not defeat the action, but only goes to the question of costs: *Boyd v. Beaudin*, Id. 202, also citing the principal case.

WHEN COURT WILL COMPEL HUSBAND TO GIVE INDEMNITY AGAINST WIFE'S RIGHT OF DOWER: See *Young v. Paul*, 64 Am. Dec. 456, note 460, where other cases are collected. The inability of a vendor of land to convey his wife's inchoate right of dower is no impediment to specific performance, if the vendee is willing to take such conveyance as the vendor can give: *Conrad v. Schwamb*, 53 Wis. 378, citing the principal case.

DEED GOOD IN FORM ONLY IS NOT SUFFICIENT COMPLIANCE WITH COVENANT to make a good and perfect deed: See *Feemster v. May*, 53 Am. Dec. 83, note 85, where other cases are collected; *Smith v. Busby*, 57 Id. 207. A tender of the vendor's own deed, without procuring his wife's relinquishment of dower, is not a satisfaction of his covenant to make the vendee a good and perfect deed: *Greenwood v. Ligon*, 48 Id. 775. An agreement to execute a good and sufficient deed of real estate implies a conveyance not only good in point of form, but one which carries with it a good and sufficient title to the land: *Bateman v. Johnson*, 10 Wis. 3, citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Martin v. Merritt*, 57 Ind. 41, to the point that specific performance may be decreed as to a part, and an abatement or compensation for the deficiency.

BLANCHARD v. McDOUGAL.

[6 WISCONSIN, 167.]

MERE PAYMENT OF PORTION OF PURCHASE MONEY, unaccompanied by any other act, is not sufficient to take a parol agreement for the sale of land out of the statute of frauds.

DELIVERY OF POSSESSION BY VENDOR TO VENDEE AND CONTINUATION THEREOF by the latter, together with the payment of a considerable part of the purchase money, will take a parol agreement for the sale of land out of the statute of frauds, provided the possession be taken and continued under the contract.

WHERE VENDEE IS IN POSSESSION AS TENANT OF VENDOR at the time of the making of a parol agreement for the sale of land, the possession will be referable to his tenancy, and not to the contract, unless it is shown

that when the contract was made it was specially agreed that thenceforth the tenancy should cease and the possession should be deemed to be under the contract.

TERMS OF PAROL CONTRACT FOR SALE OF LAND MUST BE INDUBITABLY ESTABLISHED, and must be free from all doubt or ambiguity, in order to justify a court of equity in enforcing its specific performance.

BILL for specific performance of a parol agreement for the purchase of a lot of land. The opinion states the case.

Butler, Buttrick, and Cottrill, for the appellant.

J. H. Paine and Son, for the respondent.

By Court, SMITH, J. This is a suit brought by the appellant to enforce the specific performance of a parol contract for the conveyance of land.

It is believed that this court has gone as far to enforce specifically the performance of contracts, but no further than the authorities will justify, or sound principles of equitable jurisprudence required; and we are not inclined to dispute the position that part performance of a parol contract for the purchase of lands, accompanied by delivery of possession, is sufficient to take the case out of the statute of frauds. Were that the only question here, we should have little difficulty in arriving at a satisfactory conclusion.

It is claimed by the plaintiff, and so alleged in his bill of complaint, that in September, 1855, being then in possession of lot 15 in block 68 in the seventh ward of the city of Milwaukee as a tenant under the defendant, who was the owner thereof in fee, he entered into a contract with the defendant for the purchase of the same, for the sum of three thousand dollars; fifty dollars to be paid down, four hundred and fifty dollars at the time of making the deed, and the remainder in three equal installments, with interest at the rate of eight per cent per annum; that fifty dollars was paid down at the time of making the contract; that the plaintiff remained in possession thenceforth under his contract of purchase; that he had made a tender of the four hundred and fifty dollars, and a mortgage to secure the remainder of the purchase money, and demanded a deed, which was refused.

The defendant, in his answer, denies all these material allegations fully and unequivocally. The case was brought to issue, and was heard at the September term, 1857, of the Milwaukee circuit court, upon testimony taken in open court, which is duly reported. The court below dismissed the bill, and the plaintiff appealed.

The only questions involved in the case are of fact. There is no dispute as to the law by which the rights of the parties are to be determined, the facts being ascertained.

On the part of the plaintiff, two witnesses (Loomis and Bierbach) testified to the making of the contract, substantially as alleged in the complainant's bill; and two other witnesses testified to admissions of the defendant corroborative of the contract, as testified to by the other two.

We will for a moment examine the case as it is presented by the evidence for the plaintiff. This evidence shows that in September, 1855, the plaintiff was in possession of the lot in question, as a tenant of the defendant, under a lease from him; that in September, 1855, he made a parol agreement for the purchase of the premises for three thousand dollars, of which fifty dollars was to be paid down, four hundred and fifty dollars to be paid on delivery of the deed, and the remainder in installments; and that the plaintiff was to retain possession as a purchaser, and not as a tenant; that in February, 1857, the defendant having brought suit to recover possession of the premises, the plaintiff made a tender of four hundred and fifty dollars, and a mortgage to secure the remainder of the purchase money, and demanded the execution of a deed of the premises, which was refused.

It should be remarked in the first place that the mere payment of a portion of the purchase money, unaccompanied by any other act, is not sufficient to take the case out of the statute. But where possession is delivered and continued, upon the payment of a considerable part of the purchase money, it will take the case out of the statute of frauds; for the reason that it would perpetrate a fraud upon the vendee to accept a portion of the contract price from him, induce him to remove his household goods upon the premises, or otherwise incur trouble or expense, and perhaps improve the same, and then to repudiate the contract because it was not in writing. The object of the statute was to prevent frauds and perjuries, not to encourage them. Hence the delivery of possession, in addition to the payment of a portion of the purchase money, has been held to be essential to a claim for specific performance, and for obvious reasons. In this case, however, the complainant was in possession as a tenant owing fealty to the defendant as his landlord, and the legal presumption is that such relation continued; and the possession of the plaintiff in this case is referable to the tenancy, and not to the purchase. In discussing this subject in his work on equity

jurisprudence, Mr. Justice Story, after showing that part payment was not sufficient to take the case out of the statute, proceeds to consider the effect of possession. Section 763, he says: "In like manner, where possession of the land contracted for will not be deemed a part performance, if it be obtained wrongfully by the vendee, or if it be wholly independent of the contract. So, if the vendee be a tenant in possession, under the vendor, for his possession is properly referable to his tenancy, and not to the contract:" Story's Eq. Jur., sec. 763, and cases there cited.

In this case testimony is produced on the part of the plaintiff to obviate this presumption of the continuance of the possession by tenancy and of fealty on the part of the tenant. The witnesses Loomis and Bierbach testify that in September, 1855, when the contract of purchase is alleged to have been made, that it was then agreed and understood that the plaintiff should thereafter hold possession as a purchaser, and not as a tenant. If these facts were all undisputed, perhaps the payment of the money, the termination of the tenancy, and conceding possession as a purchaser, would take the case out of the statute.

The next question which presents itself, and which is in fact the most important one involved in the case, is whether the contract is so clearly and unequivocally proved, established so clearly and free from doubt, as to justify a court of equity in enforcing specific performance. Formerly, it is said, the court would make a contract for the parties, *ex æquo et bono*, out of their transactions; but such is not the rule now. The doctrine which governs courts of equity in cases of this kind, without a dissenting opinion in recent times, is laid down in Story's Equity Jurisprudence, sec. 764, and the numerous cases there cited. He says: "But in order to take a case out of the statute upon the ground of part performance of a parol contract, it is not only indispensable that the acts should be clear and definite, and referable exclusively to the contract, but the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms. If the terms are uncertain or ambiguous, or not made out by satisfactory proof, a specific performance will not (as, indeed, upon principle it should not) be decreed. The reason would seem obvious enough; for a court of equity ought not to act upon conjectures, and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn, written contracts."

Upon these principles, we must ascertain and determine the right of the complainant to a specific performance of the alleged contract under the proof submitted.

We do not propose to enter into an elaborate analysis of the evidence produced at the hearing, but it will be sufficient to refer to some of its leading features. It will be remembered that this is a parol contract outlawed by the statute, and only to be relieved by such clear and definite acts, referable exclusively to a contract showing part performance and possession, but the contract itself must be indubitably established in clear and unequivocal terms.

How nearly does the evidence in the case come up to these requirements? The witnesses Loomis and Bierbach say they were present at the shop of Blanchard in September, 1855, when a conversation occurred between the plaintiff and defendant, in which the plaintiff bought of the defendant the lot in dispute for three thousand dollars, of which sum fifty dollars was paid down, four hundred and fifty dollars to be paid when the deed should be delivered, and the remainder in installments. Two other witnesses testified to the admission of the defendant that he had sold the lot to the plaintiff. Another witness, Higgins, also testified that the defendant in the latter part of 1855 told him that he supposed he had sold the lot. Loomis and Bierbach also testified that it was stated at the time of the contract that the plaintiff was to retain possession as a purchaser, and not as a tenant, as he had heretofore been. These items of evidence are here presented, that they may appear in connection with the facts proved on the part of the defense. To make the case of the plaintiff complete, it may be again stated that he caused a tender of four hundred and fifty dollars, together with a mortgage for the balance of the purchase money, to be made in February, 1855, and demanded a deed, which was refused.

On the part of the defendant, it was proved that in March, 1855, the plaintiff desired Mr. Edwin Palmer to join him in the purchasing of this lot, and that conversations in relation to that object occurred from time to time up to the winter following. Palmer called with Blanchard about the first of September on the defendant to purchase the lot, but they could not purchase it. Plaintiff never pretended to have bought the lot. Hortensius Paine testified that in the spring of 1856 the defendant and Blanchard came to the office of Paine & Sous, attorneys, when the defendant said he had brought the plaintiff in again, and

that he had agreed again to leave the lot. The plaintiff said he would go out in a few days, that his family was sick, and that he was poor and not able to pay the rent, and that he would leave as soon as he could get a place to go to. Nothing was said about his buying the lot.

Another witness, Walter S. Hunn, testified that in December, 1855, or January, 1856, Blanchard said he had talked of buying the lot, but had not bought it; that Grant stood in the way. Witness was going to take the lot from plaintiff, but the deed was to come from defendant. Plaintiff was to have three hundred dollars for buying the lot for the witness.

As late as the winter of 1857 the plaintiff told the witness McNeal more than ten times that Grant had prevented his making an excellent trade with the defendant for this lot.

And another fact appears by the testimony of Loomis, that no step was taken by the plaintiff to pursue his parol contract to a written consummation until February, 1857, after the defendant had commenced his action to recover possession.

I am free to admit that I am unable to reconcile this conflicting evidence with the perfect truth and honesty of the parties and witnesses. If the witnesses for the defendant are to be believed, the conduct of the plaintiff is utterly inconsistent with, nay, wholly repugnant to, that of a purchaser of the estate in possession under purchase, or contract of purchase. His frequent admission of the continued relation of landlord and tenant long after the alleged contract of purchase, his repeated declaration that he had not made the purchase, and could not, that Grant stood in the way, and as late as 1857, that Grant prevented his making the purchase, and on the payment of only fifty dollars alleged to be of the purchase money in September, 1855, at the same time he was in possession as a tenant, whether owing rent or not at the time does not appear, and with such small payment upon a contract resting wholly in parol—quietly resting until February, 1857, when the defendant commenced proceedings against him as a tenant holding over;—all these facts and circumstances tend to throw very great doubt over the truth of the alleged contract.

It is not proposed to enter into any consideration of the impeaching testimony. Considering it equally balanced, we find witnesses whom we would be unwilling to discredit testifying to facts and circumstances inconsistent with each other. As we have already said, this is not a case of preponderance of evidence. If the material fact, viz., the making of the contract or its essential terms, are left in doubt, a court of equity cannot,

upon mere preponderance of evidence, decree specific performance. I frankly confess that were this an issue at common law, and I a juror to try upon the evidence here submitted, I should have very great doubt as to the verdict to be rendered, as to the making of the contract set out in the bill of complaint. This being the case, the evidence conflicting, unsatisfactory, and inconclusive as to the making of the contract or its terms, a specific performance cannot be ordered.

It is claimed that the admissions and conduct of the complainant may be explained on the hypothesis that he was not acquainted with the extent of his rights in equity. This may be so; but if it were so, we would still be left to conjecture as to the fact of the contract and its terms. But it would seem from the extreme, if not extraordinary, caution which was used, according to the testimony of Loomis and Bierbach, to designate a new and distinctive character of the complainant's possession, changing it from that of a tenant to that of a purchaser, that the complainant was not ignorant of the principles upon which his rights would be adjudicated.

At all events, we think that the testimony is so conflicting and so doubtful that we cannot order a specific performance of the alleged contract. We say "the alleged contract," because our doubt is, whether the contract was in truth and in fact fully made and settled upon between the parties. We do not wish to be understood as discrediting the witnesses on either side. It is easy to misunderstand, and easy to misinterpret, when matters rest wholly in words. But the conduct of the parties, their actions after the alleged purchase, the one dunning for rent, the other pleading his poverty and sickness of his family in excuse for non-payment; the one prosecuting for recovery of possession, the other craving time, speaking of sickness in his family, promising to leave when he could find another place;—these actions of the parties speak in a language more indicative of the real intentions and relations of the respective parties, and of the true condition of things, than any formal rehearsal of a contract could do; and yet, when these transactions leave the making of the contract uncertain and its terms doubtful, specific performance must be denied, for nothing specific is conclusively proved. The parties must be left to their remedy at law, if any they have. Such is this case, and therefore we must affirm the judgment of the court below dismissing the complainant's bill with costs: See *Hazleton v. Putnam*, 3 Chand. 117 [54 Am. Dec. 158], and numerous cases there cited.

Judgment affirmed, with costs.

CONTRACT MUST BE CLEAR AND CERTAIN TO OBTAIN SPECIFIC PERFORMANCE: See *Johnson v. Hubbell*, 66 Am. Dec. 773, note 783, where other cases are collected; *Rankin v. Simpson*, 57 Id. 668, note 671; *Kercheval v. Doty*, 31 Wis. 49; *Schmeling v. Kriesel*, 45 Id. 327, both citing the principal case.

WHERE IT WOULD BE FRAUD UPON ONE OF PARTIES TO PAROL CONTRACT for the other side not to fulfill it, its specific performance will be enforced: *Wynn v. Garland*, 68 Am. Dec. 190, note 201, where other cases are collected; *Johnson v. Hubbell*, 66 Id. 773, note 783; *Fisher v. Moolick*, 13 Wis. 324; *Ingles v. Patterson*, 36 Id. 377, both citing the principal case.

PART PAYMENT ON PAROL CONTRACT FOR SALE OF LANDS does not take the case out of the statute of frauds: See *Baldwin v. Palmer*, 61 Am. Dec. 743, note 745; *Gangwer v. Fry*, 55 Id. 578, note 581, where other cases are collected. The mere payment of the purchase money, without any other act, is not sufficient to constitute part performance to take the case out of the statute of frauds. But where possession is delivered and continued upon the payment of a considerable part of the purchase money, it will be sufficient to take the case out of the statute: *Brandeis v. Neustadt*, 13 Wis. 152, citing the principal case. The partial payment of the consideration will not entitle a party to a specific performance of a parol contract for the conveyance of real estate: *Horn v. Ludington*, 32 Id. 77, citing the principal case.

POSSESSION AS EVIDENCE OF PART PERFORMANCE TO TAKE CASE OUT OF STATUTE OF FRAUDS: See *Parrill v. McKinley*, 58 Am. Dec. 212; *Rankin v. Simpson*, 57 Id. 668, note 671, where other cases are collected; *Gangwer v. Fry*, 55 Id. 578; *Kerr v. Day*, 53 Id. 526, note 532; *Hoen v. Simmons*, 52 Id. 291, note 294; *Osborn v. Phelps*, 48 Id. 133; *Dugan v. Gittings*, 43 Id. 306; *Baring v. Peirce*, 40 Id. 534; *Pugh v. Good*, 37 Id. 534, note 541. The possession of lands by the plaintiff will not take the case out of the statute of frauds, unless it is exclusively referable to the contract: *Knoll v. Harvey*, 19 Wis. 100, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Lavassar v. Washburne*, 50 Wis. 202, to the point that a written instrument will not be canceled or rescinded on the ground of fraud, except upon clear proofs.

DEXTER v. COLLE

[6 WISCONSIN, 319.]

TRESPASS DE BONIS ASPORTATIS MAY BE SUSTAINED BY PROOF OF ANY UNLAWFUL INTERFERENCE with or exercise of acts of ownership over property, to the exclusion of the owner. It is not necessary to prove actual forcible dispossession of the property, in order to maintain the action.

WRONGFUL INTENT IS NOT NECESSARY TO CONSTITUTE TRESPASS; it is sufficient if the act is done without a justifiable cause or purpose, though it be done accidentally or by mistake.

WHERE THERE IS SOME EVIDENCE TO SUPPORT VERDICT OF JURY, the court should not reverse the judgment because the proof is not, in its opinion, sufficient to justify the finding of the jury.

TRESPASS for taking and driving away a number of sheep belonging to the plaintiff. The cause was tried before a justice of

the peace and a jury. The evidence showed that the defendant, a butcher at Milwaukee, was driving some sheep to the city to be slaughtered, when they became mixed with a small flock of sheep belonging to the plaintiff, which were running at large on the highway. The jury found that some four of plaintiff's sheep were driven by the defendant to Milwaukee, and there slaughtered by him in his business, and gave a verdict for the plaintiff. The cause was removed to the county court by *certiorari*, and that court reversed the judgment of the justice. To reverse the latter judgment this writ of error is brought.

James H. Paine and Son, for the plaintiff in error.

Butler, Bultrick, and Coltrill, for the defendant in error.

By Court, COLE, J. We have no doubt but the action of trespass would lie in this case. In driving off the sheep the defendant in error without doubt unlawfully interfered with the property of Dexter; and it has been frequently decided that, to maintain trespass *de bonis asportatis*, it was not necessary to prove actual, forcible dispossession of property, but that evidence of any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner, would sustain the action: *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Met. 27; *Phillips v. Hall*, 8 Wend. 610 [24 Am. Dec. 108]; *Morgan v. Varick*, Id. 587; *Wintringham v. Lafroy*, 7 Cow. 735; *Reynolds v. Shuler*, 5 Id. 325; 1 Ch. Pl., 11th Am. ed., 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake: 2 Greenl. Ev., sec. 622; *Guille v. Swan*, 19 Johns. 881 [10 Am. Dec. 234]. There is nothing inconsistent with these authorities in the case of *Parker v. Walrod*, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error.

Upon the other point in the case, we think there was some evidence to support the verdict of the jury, and therefore the judgment of the justice should not be reversed because the proof was insufficient. It was the province of the jury to weigh the evidence, and determine what facts were established by it; and the county court ought not to reverse the judgment because the proof was not sufficient in its opinion to justify the finding of the jury. The judgment of the county court is therefore reversed, and the judgment of the justice affirmed.

WRONGFUL INTENT NEED NOT BE PROVED IN ORDER TO CONSTITUTE TRESPASS: See *Stanley v. Gaylord*, 48 Am. Dec. 643; *Newsom v. Anderson*, 37 Id. 406, note 407, where other cases are collected.

ANY UNLAWFUL INTERFERENCE WITH PROPERTY OF ANOTHER IS TRESPASS: See *Raml v. Sargent*, 39 Am. Dec. 623; *Hazellon v. Week*, 49 Wis. 664, citing the principal case.

GOMBER v. HACKETT.

[6 WILCOX, 328.]

ACCEPTANCE BY LANDLORD OF RENT FROM TENANT ACCRUING AFTER FORFEITURE operates as a waiver of the breach of the condition of a lease.

FORCEFUL detainer brought on account of an alleged breach of the condition of a lease by cutting timber. The opinion states the facts.

L. Wyman, for the plaintiff in error.

By Court, COLB, J. The rule seems to be well settled that the acceptance of rent by the landlord from the tenant, accruing due after the forfeiture, will operate as a waiver of the breach complained of: See 2 Platt on Leases, 468; Taylor's Land. & Ten., sec. 497; *Jackson v. Allen*, 3 Cow. 229; *Bleecker v. Smith*, 13 Wend. 530; *Prindle v. Anderson*, 19 Id. 391; *Collins v. Canty*, 6 Cush. 415; *Goodrich v. Cardwent*, 6 T. R. 219, and cases there cited. In this case the answer alleges that after the commencement of the suit by Hackett to recover the possession of the demised premises for a breach of the condition in reference to cutting timber, to wit, on the thirteenth of March, 1857, he demanded and received of and from the plaintiff in error the sum of one hundred and forty dollars for rent becoming due subsequent to such breach, and that this was rent for the use of the premises for one year in advance from the first of March, 1857. By this act the landlord recognized the lease as a subsisting operative contract; and he ought not, therefore, to be permitted further to insist upon the forfeiture, if there had been one. It was optional with him to consider the estate forfeited for condition broken, and proceed to recover possession, or to waive the forfeiture and consider the lease valid. He has made his election, and must abide by it. It would be very inequitable and unjust to permit the landlord to recover possession of the premises when he had already received from his tenant the rent for the use of the same to March, 1858. It follows from the view we

have taken of the case that the court improperly sustained the demurrer to the answer.

Judgment reversed, and cause remanded for further proceedings.

LESSOR MAY WAIVE FORFEITURE OF LEASE and still continue the lease: See *Clark v. Jones*, 43 Am. Dec. 706, note 706, where other cases are collected. Receiving or distraining for rent that becomes due after the act which might work a forfeiture, where such act is known to the lessor, is a waiver of the right to enter which he cannot recall: *Camp v. Scott*, 47 Conn. 370, citing the principal case.

AMES v. MARTIN.

[6 WISCONSIN, 361.]

COLT FOUR MONTHS OLD IS NOT EXEMPT FROM EXECUTION, as forming with its mother a "span of horses," within the meaning of the Wisconsin statute.

RUFLEVIN. The opinion states the case.

Abbott and Clark, for the plaintiff in error.

H. E. Frink, for the defendant in error.

By Court, COLE, J. It is provided by subdivision 6, section 58, chapter 102, revised statutes, that among other personal property, "a span of horses" shall be exempt from sale under an execution, or attachment; and the question in this case is, whether a colt four months old with its mother (where the defendant has no other horse or team of any kind) can fairly be said to be included in this language, so as to exempt the colt from sale. Although we are disposed to give our statute a liberal interpretation, so as to exempt all the property that the legislature intended should be exempted, yet we do not think that a colt four months old and its mother, in the popular and ordinary acceptation of the language, can be said to be "a span of horses." It was contended on the argument by the counsel for the plaintiff in error that the word "horse," wherever used in this statute, should be taken in its broadest signification, as meaning an animal of the equine family, old or young. And in support of this construction of the statute, we were referred to the case of *Freeman v. Carpenter*, 10 Vt. 438 [33 Am. Dec. 210], where the court held that the word "cow," in the exemption law of Vermont, included a heifer two years old. But the Vermont statute and the statute of this state are not *in pari materia*,

and an exposition of the word "cow," in the one, can hardly be adopted as a correct rule for ascertaining and determining the sense of the word "horse," in the other. We should have but little difficulty in saying that the word "horse," in the statute, was intended to include a young colt, were it not used in connection with the word "span." This word seems to qualify and limit the meaning of the word "horse." For the ordinary and familiar signification of the language, "a span of horses," is two animals which may be connected together or united for the purpose of a team. Such is the common understanding of the language, and we think it must have that meaning here. It is quite obvious that a colt four months old could not be connected with another horse and used for a team.

The judgment of the circuit court is therefore affirmed.

CONSTRUCTION OF WORD "TEAM" IN EXEMPTION STATUTE: See note to *Rockwell v. Hubbell's Adm'r*, 45 Am. Dec. 254, where this subject is discussed at length.

WALSH v. BLATCHLEY.

[6 WISCONSIN, 423.]

INDORSEMENT OF FIRST OF SET OF BILLS OF EXCHANGE carries with it the second and third. Either of the set may be presented for acceptance, and if not accepted, upon due notice, a right of action arises against the indorser.

DELAY OF MAIL IS GOOD EXCUSE FOR NOT IMMEDIATELY PRESENTING bill of exchange for acceptance, and its immediate presentation after arrival is sufficient to charge the indorser.

INDORSEE OF BILL OF EXCHANGE MAY DECLARE ON FIRST OF SET, and produce in evidence on the trial the second duly presented and dishonored.

TRESPASS on the case upon promises for money lent, money laid out and expended, and money paid and received for the use of the plaintiffs. The facts appear from the opinion.

Orton, Hopkins, and Firman, for the appellant.

Smith and Keyes, for the respondent.

By Court, COLB, J. This case was tried by the court without the intervention of a jury, and the judge found the following facts:

1. That the action is brought upon the bill of exchange introduced in evidence, and described in the plaintiff's declaration. That this bill, which is the second of the set, was indorsed by the defendants on a Sunday.

2. That the first of the set was sold by defendants to plaintiff about the first of January, 1855; that the plaintiff, without delay, sent the same by mail to his correspondent in New York city, the residence of the drawee, for presentation for payment; that by some delay in the mail the letter did not reach New York until the ninth of April following, at which time the letter, with inclosure, was duly received by the said correspondent; that the bill was not presented for payment.

3. That in the last of March the plaintiff, fearing the said first bill was lost, procured the defendants to indorse and deliver to him the second of the set, and had it presented on the third day of April following, for payment, to the drawee, and payment was refused. The bill was duly protested, and proper notice given to the defendants, who were indorsers.

The conclusions of law which the court drew from these facts were: "1. That the liability in this action, if any at all, is upon the second bill of the set, and not on the first; 2. That because the said bill was indorsed on Sunday, that therefore such indorsement was absolutely void."

We have examined with considerable care the authorities, and have not been able to find a case precisely like the present, although it would seem as if the point must have frequently arisen in the courts in this country and in England. The case of *Pereira v. Jopp*, cited in a note to *Holdsworth v. Hunter*, 10 Barn. & Cress. 449, would seem to have a strong bearing upon the case at bar. It was there held that he to whom any part of the set is first transferred acquires a property in all the other parts, and may maintain trover even against a *bona fide* holder who subsequently, by transfer or otherwise, gets possession of another part of the set; that is, deciding that the first indorsement of one of the set vests in the indorsee the absolute right to the possession of the whole set. And we suppose it would follow from this doctrine that the indorsement of the second in this case was entirely unnecessary. The liability of the indorser arose from indorsing the first of the set for value. We think her liability was not increased one jot or tittle by indorsing the second of the set. Suppose she had indorsed all of them in January, at the time she indorsed the first, is it not obvious that her liability would not have been different from what it is? It is conceded that the indorsement of the first was good, and this indorsement was entirely adequate to carry with it the second and third: See Edwards on Bills, 304, 162; *Holdsworth v. Hunter*, 10 Barn. & Cress. 449; *Kenworthy v. Hopkins*, 1 Johns. Cas. 107. Either of the

set may be presented for acceptance, and if not accepted, a right of action arises upon due notice against the indorser: *Downes v. Church*, 13 Pet. 205. The bill upon which the protest was made was declared on and produced, and it also appeared that the first had not been presented for payment. The court says, and we think properly and correctly, that if the first had been presented for payment and protested, even as late as April 9th, that upon proper notice the indorser would have been held, for the delay in the mail would have been a sufficient excuse for the apparent neglect in not presenting it for acceptance before. The case might have been relieved from all doubt or difficulty had the indorsee declared upon the first of the set, and produced on the trial the second, which had been presented for acceptance and dishonored: *Wells v. Whitehead*, 15 Wend. 527. This he did not see fit to do, but we think he was entitled to recover, even as the facts appeared before the court.

The judgment is reversed, and a new trial ordered.

WHERE BILL FAILS TO REACH ITS DESTINATION THROUGH MISTAKE OF POSTMASTER in sending it beyond that place, but it is presented on its return there, such presentment is good, although not made until after the bill was due: *Windham Bank v. Norton*, 56 Am. Dec. 397.

SEWELL v. EATON.

[6 WISCONSIN, 490.]

SUPREME COURT WILL NOT REVERSE RULING OF COURT EXCLUDING LETTER offered in evidence at the trial, when the bill of exceptions does not disclose what were its contents.

SALE OF PERSONAL PROPERTY IS COMPLETE, AND PASSES TITLE TO BUYER, although the thing sold has not been measured or the quantity ascertained in any way, when it is apparent that it is the intention of the seller to transfer the title, and of the buyer to accept it.

Trover for the conversion of a quantity of oak plank. The opinion states the facts.

Eldridge and Waite, for the plaintiff in error.

Edward S. Bragg, for the defendant in error.

By Court, WHITON, C. J. We lay out of the case the error relied upon by the counsel for the plaintiff in error, relating to the refusal of the judge to allow the letter of the defendant to be read in evidence to the jury, as we cannot tell from the bill of exceptions what its contents were. The bill of exceptions

only informs us that the plaintiff offered to read in evidence a letter written by the defendant, for the purpose of showing that he assumed to own the plank in controversy; but whether the letter really did tend to show that fact, we cannot tell. We cannot infer that the letter did tend to show it, and cannot therefore decide that the judge committed an error in rejecting the evidence. We shall confine ourselves, therefore, to the other error alleged, to wit, the question of the nonsuit for the reason that the testimony of the plaintiff did not show that he was the owner of the plank in controversy.

The bill of exceptions shows that the motion for a nonsuit, which the judge sustained, was founded upon a single fact. It appears that the defendant moved for the nonsuit "on the ground that the title to the plank in controversy did not pass to the plaintiff by virtue of his purchase of said Potter because said plank were not measured."

This is the sole ground for the nonsuit. It appears from the testimony that the plaintiff purchased from one O. R. Potter a quantity of plank lying in different places, for the sum of eight dollars per thousand feet, of which those in controversy formed a portion, and took from Potter a written bill of sale of them; that at the time of the purchase the plaintiff paid Potter one hundred and sixteen dollars toward the plank, in a note which he held against him; that some of the plank had been sold by the plaintiff to other persons after his purchase of them from Potter, and had been delivered and measured. But it did not appear that those which were the subject-matter of this suit had been measured, or the quantity ascertained in any way.

We think the nonsuit should not have been granted. Of course, we must consider the sale of the plank to the plaintiff to have been *bona fide*, and must limit our inquiry to the single fact that the plank which are the subject of this suit had not been measured. It is to be observed that the sale to the plaintiff was of a quantity which included those which are the subject of this suit, and that some of them had been delivered and measured.

The counsel for the defendant in error contends that in sales of personal property, if anything remains to be done to ascertain the quantity or exact amount of the price to be paid the title does not pass, and he has cited numerous authorities in support of his position. We are aware that the authorities upon this subject are not uniform, but those which we cite in support of our position seem to be founded upon better reason

than those which sustain the contrary doctrine; especially so when it is apparent, as in this case, that it was the intention of the vendor to transfer the title, and of the vendee to accept it: See *Riddle v. Varnum*, 20 Pick. 280; *Macomber v. Parker*, 13 Id. 175; *Phillips v. Bristol*, 2 Barn. & Cress. 511; *Turling v. Baxter*, 6 Id. 360; *Rugg v. Merritt*, 11 East, 210.

The judgment reversed and a new trial granted.

APPELLATE COURT WILL NOT DECIDE UPON ADMISSIBILITY OR RECORD of a court when the bill of exceptions does not disclose its contents: *Sanford v. Howard*, 68 Am. Dec. 101, note 108, where other cases are collected.

OBJECTIONS TO EVIDENCE SHOULD STATE GROUNDS THEREOF: *George v. Thomas*, 67 Am. Dec. 612; *McCartney v. Shepard*, 64 Id. 250, note 254, where other cases are collected. To establish error in rejecting evidence offered, it must be made to appear that the fact sought to be shown was material to the matter in controversy: *Ranger v. Goodrich*, 17 Wis. 83, citing the principal case.

SALE OF PERSONALTY, WHEN COMPLETE SO AS TO PASS TITLE: See *Winslow v. Leonard*, 62 Am. Dec. 354, note 359, where other cases are collected. A sale is perfect where nothing remains to be done to complete it: *Sanborn v. Hunt*, 10 Wis. 439, citing the principal case. The mere fact that something remains to be done to the property sold does not prevent the sale from being complete, where it is evidently the intention of the parties that the title shall presently pass: *Morrow v. Reed*, 30 Id. 88; *Fletcher v. Ingram*, 46 Id. 201, both citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Savage v. Drake*, 8 Wis. 275; and in *Smith v. Board of Supervisors of Barron Co.*, 44 Id. 692.

EDGERTON v. BIRD.

[6 WISCONSIN, 527.]

CONVEYANCE OF LAND BY PARTY OUT OF POSSESSION, and with an adverse possession against him, is void at common law.

COLOR OF TITLE IS THAT WHICH IN APPEARANCE IS TITLE, but which in reality is no title.

TAX DEED, THOUGH VOID ON ITS FACE, IS SUFFICIENT TO SHOW COLOR OF TITLE in the grantee who in good faith took possession thereunder of the premises conveyed, and claimed to hold them as against the real owner, and is therefore admissible in evidence for that purpose.

SUIT FOR RECOVERY OF LANDS SOLD FOR TAXES, except in cases where the taxes have been paid or the lands redeemed according to law, must by the Wisconsin statute be commenced within three years from the time of recording the tax deed of sale, and cannot be commenced thereafter.

EJECTMENT. The opinion states the case.

Orton, Hopkins, and Firman, for the plaintiff in error.

Abbott and Clark, for the defendant in error.

By Court, COLZ, J. The only question we have to consider in this case is, whether the defendant had such possession of the premises sought to be recovered as to bar the plaintiff's right of action. It appears that the plaintiff, upon the trial, introduced and offered in evidence a patent from the United States for certain lands, of which the premises in controversy were a part, to James D. Doty and Stevens T. Mason, dated August 10, 1837, and traced his chain of title from this patent through a number of mesne conveyances to the decedent of the plaintiff. Some of these conveyances were executed while the defendant and her husband were in possession of the premises, claiming to hold them under a tax title. The defendant, to defeat a recovery, offered in evidence this tax deed, which bore date December 16, 1841, purporting to be made and executed by R. L. Ream, clerk of the board of county commissioners of the county of Dane, reciting that the premises had been sold for the taxes for the year 1839 unto Daniel Wells, jun., and that the certificates had been assigned to Prosper B. Bird, the husband of the defendant, and the person to whom the tax deed was given. To the reading of this latter deed in evidence the counsel for the plaintiff objected, on the ground that the deed was void on its face; but the court decided that although the deed was void on its face, because the territory of Wisconsin is not the grantor therein, and because the deed did not convey title to said premises, yet that the same might be received in evidence for the purpose of showing colorable title; and the deed was read to the jury under an exception taken by the plaintiff. In connection with the deed, the defendant proved that Prosper B. Bird, from and after the date thereof, and by virtue of the deed, claimed to hold, and did hold, possession of the premises, until his death in the year 1852; and further proved that she and her family had occupied the premises since the death of her husband until the commencement of this suit. Upon the evidence submitted, the jury found a verdict for the defendant. The plaintiff moved for a new trial, which motion the court overruled, and the principal error assigned here is the ruling of the court admitting the tax deed in evidence for any purpose whatever.

Among the deeds offered in evidence by the plaintiff to establish his right to recover was the deed from Doty and wife to Delaplaine and Burdick, dated May 8, 1849, executed while Bird was in possession of the premises, claiming to hold them under his tax deed, and therefore the former deed, given as it was by one out of possession, was void as against Bird holding

adversely, according to the decision of the late supreme court in the cause of *Whitney v. Powell*, 1 Chand. 52, and *Woodward v. McReynolds*, Id. 244. A reconsideration of the doctrine of those cases has been pressed upon us by the counsel for the plaintiff in error, in view of the force and meaning of section 7, page 239, of the revised statutes of the territory of Wisconsin, which provides that "whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of any premises under the claim of title, exclusive of any other right, founding such claim upon some written instrument, or as being a conveyance of the premises in question, or upon the decree or judgment of some competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises under such claim: for twenty years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot of the same tract." We do not suppose this provision of the statute in any wise changes or modifies the common law in reference to the sale of pretended titles to real estate, and which makes a conveyance by a party out of possession, and with an adverse possession against him, void. The obvious import and meaning of the provision appears to be to declare what facts and circumstances in a given case shall constitute and be deemed to be adverse possession; that is, when an occupant enters into possession under a claim of title founded exclusively upon some written instrument or record, and continued in occupation and possession of the premises included in such instrument or record, or of some part thereof, for twenty years, he shall be considered as holding adversely, and can avail himself of the protection of the statute of limitations, even as against the rightful owner of the land. Such a continued occupation and adverse holding would bar an entry by one having the legal title. This is the meaning of this section, as we understand it. We are entirely satisfied with the soundness of the doctrine laid down in the cases of *Whitney v. Powell*, *supra*, and *Woodward v. McReynolds*, *supra*, and have no doubt but they are a correct exposition of the law of the territory of Wisconsin, and of the state, previous to the passage of the revised statutes. Section 7, chapter 59, of the revised statutes, changes in this respect the common law which made every grant of land, except a release, void as an act of maintenance, if at the time the

lands were actually in the possession of another person claiming under a title adverse to that of the grantor. In the present case, it appears to have been proved on the trial that from the date of the tax deed, and by virtue of that deed, Bird claimed to hold, and did really hold, possession of the premises until his death in 1852, and that the defendant, with her family, has occupied them since that time until the commencement of this suit. The possession and occupation seem to have been actual, continued, and notorious, under the tax deed, and as a matter of course hostile to the title of the true owner. But it was insisted, upon the argument of the cause by the counsel for the plaintiff, that the tax deed is void upon its face, and therefore was not evidence of colorable title; for it is said, to constitute adverse possession the person actually holding must claim in good faith under a title hostile to the title of the real owner; that the court must determine by an inspection of the deed, or other evidence of title, whether the claim of title was hostile or adverse; and if it appeared that the title, paper, or contract was not in the nature and form of a conveyance, but showed upon its face that it was a nullity, the claim of title under such an instrument could not be adverse, the presumption being that the person holding knew whether the title paper on its face was good or not, and if it was not adequate to carry the true title, it was evidence of bad faith in the one claiming under it.

Although the cases on adverse possession and the statutes of limitation are numerous in the books, it is not always easy to ascertain and determine what is meant by the phrase "color of title." In the case of *Wright v. Mattison*, 18 How. 50, the court, upon this subject, says: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title under which an entry or claim has been made in good faith. We refer to a few decisions by this court which are deemed conclusive, to the point that a claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the

protection of the statutes of limitation, other requisites of those statutes being complied with." The cases of *Gregg v. Sayre*, 8 Pet. 253, *Ewing v. Bennett*, 11 Id. 41, and *Pillow v. Roberts*, 13 How. 472, are cited in the opinion of the court. See also the case of *Woodward v. Blanchard*, 16 Ill. 424, and cases there cited; also the cases cited and commented on in the notes to *Taylor v. Horde*, 2 Smith's Lead. Cas. 307, marginal paging. "Color of title may be made through conveyances, or bonds and contracts, or bare possession under parol agreements."

In Massachusetts it is held that where a party enters, not under any deed or written title, but merely assumes possession with claim of right, there is a disseisin to the extent of the land which he actually occupies, cultivates, incloses, or otherwise excludes the owner from: *Small v. Proctor*, 15 Mass. 495; *Boston Mill Corporation v. Bulfinch*, 6 Id. 229; *Brown v. Porter*, 10 Id. 93; *Coburn v. Hollis*, 3 Met. 125; *Sumner v. Stevens*, Id. 337; *Slater v. Rawson*, Id. 439. We are of the opinion that the tax deed is sufficient to show color of title in Bird, within the doctrine of the case of *Wright v. Mattison*, 18 How. 50, and many other well-considered cases found in the reports, without regard to its intrinsic worth as a title, or the informality in its execution. And we see no reason to doubt the sincerity and good faith of Bird in taking possession of the premises under the deed, and occupying and improving them, and claiming to hold them as against the real owner. He undoubtedly supposed that the tax deed was good, and conveyed to him all the title the territorial government could convey by a tax deed, or he would not have relied upon it and improved the premises. The property is lots situated in the then village and now city of Madison; and the continued claim of Bird and his widow, the defendant, has been evidenced by public acts of ownership, such as they would exercise over property they owned in their own right. We therefore think the circuit court properly admitted the tax deed in evidence to show colorable title in the husband of the defendant, and the character of that possession. We are clear that this possession was adverse, and that the deed from Doty and wife, dated in May, 1849, was null and void, and conveyed no title.

But there is another view which can be taken of this case, equally decisive against the plaintiff, and which disposes of both chains of the title attempted to be established by him on the trial. By section 123, chapter 15, of the revised statutes, it is provided that "any suit or proceeding for the recovery of lands sold for

taxes, except in cases where the taxes have been paid, or the lands redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter." If any force or effect is given to this provision of law, it must, under the facts and circumstances of this case, defeat the action. The defendant has possession under a recorded tax deed, and had had possession under such a deed more than three years at the time the suit was brought. The tax deed was given in 1841, and it does not seem very inequitable to apply this statute of repose as a shield to protect the possession of the defendant.

The judgment of the circuit court is affirmed.

CONVEYANCE OF LAND IN ADVERSE POSSESSION OF ANOTHER, WHEN VOID, AND WHEN NOT: See *West v. Drawhorn*, 65 Am. Dec. 614; *Abernathy v. Loazman*, 60 Id. 459, note 461; *Pratt v. Pierce*, 58 Id. 758, note 761, where other cases are collected; *Pitts v. Bullard*, 46 Id. 405; *Hall's Lessee v. Ashby*, 34 Id. 424, note 426.

COLOR OF TITLE, WHAT IT IS, WHAT MAY GIVE IT, AND EFFECT OF IT: See *Green v. Kellum*, 62 Am. Dec. 332, note 334, where other cases are collected; *Royall v. Lessee of Lisle*, 60 Id. 712, note 716; *Bailey v. Carleton*, 37 Id. 190. A tax deed, though on its face informal and defective in substance, is admissible in evidence to show color of title in a defendant, so as to give him the benefit of the statute of limitations: *Leffingwell v. Warren*, 2 Black, 603, citing the principal case. And a sheriff's deed is admissible to show color of title, although unaccompanied by the execution under which the sale was made: *Burkhalter v. Edwards*, 60 Am. Dec. 744. A person has color of title to lands when he has an apparent though not real title thereto, founded upon a deed which purports to convey them to him: *Seignacret v. Fuhey*, 27 Minn. 62, citing the principal case.

ACTIONS FOR RECOVERY OF LANDS SOLD FOR TAXES, except where the taxes have been paid or the lands been sold according to law, must, under the one hundred and twenty-third section of chapter 15 of the revised statutes of Wisconsin, be commenced within three years from the time of the recording of the tax deed of sale, and cannot be commenced thereafter: *Falkner v. Dorman*, 7 Wis. 392; *Sprecker v. Wakeley*, 11 Id. 436; *Hill v. Kricke*, Id. 446; *Parish v. Eager*, 15 Id. 537; *Lindsay v. Fay*, 25 Id. 462; *Smith v. Ford*, 48 Id. 161; *Smith v. Sherry*, 54 Id. 128; *Peck v. Comstock*, 6 Fed. Rep. 24, all citing the principal case. But in order to give a party the benefit of this act, he must have taken actual and adverse possession, and have held it during the three years next after the recording of the tax deed: *McMillan v. Wehle*, 55 Wis. 690, citing the principal case. When the statute has run in favor of the grantee, the tax deed becomes conclusive to the same extent: *Oconto Co. v. Jerrard*, 46 Id. 327, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Reilly v. City of Racine*, 51 Wis. 528, to the point that it is necessary to show adverse possession that the possession is under claim or color of title.

SHEPARD v. MILWAUKEE GAS LIGHT CO.

[6 WISCONSIN, 539.]

GAS COMPANY TO WHICH HAS BEEN GRANTED EXCLUSIVE RIGHT to manufacture and sell gas in a city, to be consumed therein by its citizens, is bound to furnish gas to a citizen who has made all necessary preparations to receive and use the same in his store or residence along the line of the company's pipes, upon his compliance with such reasonable conditions or terms as the company may rightfully impose.

GAS COMPANY HAS RIGHT TO MAKE SUCH NEEDFUL RULES AND REGULATIONS for its own convenience and security and for the safety of the public as are reasonable and just, and to exact from the consumer a promise of conformity thereto.

RULE OF GAS COMPANY ALLOWING IT TO DEMAND SECURITY for the gas consumed, or a deposit of money to secure payment therefor, is just, and necessary to guard against loss.

PERSON IS NOT BOUND, IN ORDER TO ENTITLE HIM TO BE FURNISHED WITH GAS, to subscribe to a rule of the gas company which authorizes it by its inspector to have free access at all times to buildings and dwellings, to examine the whole apparatus, and to remove the meter and service-pipe. Such a regulation is too general, and cannot be upheld.

RULE RESERVING TO GAS COMPANY RIGHT AT ANY TIME TO CUT OFF COMMUNICATION of the service-pipe, if it shall find it necessary so to do to protect the works against abuse or fraud, is invalid. The company must rely for protection against fraud upon the same tribunals that the law provides for individuals.

GAS COMPANY HAS NO POWER TO IMPOSE PENALTY for the violation of one of its regulations, nor has it the right to make the submission to such penalty a condition precedent to the right of a citizen to be furnished with gas.

ACTION to recover from the defendant damages for refusing to furnish gas to the plaintiff. The opinion states the case.

William P. Lynde, for the appellant.

Smith and Solomon, for the respondent.

By Court, SMITH, J. The material facts in this case are as follows: The defendant is a chartered company, or corporation, having the exclusive right to manufacture and sell gas for the purpose of lighting the city of Milwaukee, and the places of business and residences of the inhabitants of said city, according to the terms of a contract entered into originally between John Lockwood and said city, and in conformity with the duties and obligations resulting from the act of its incorporation.

The plaintiff was a merchant doing business on East Water street in said city, along which the gas-pipes of the company were laid, and had fitted up his store with the necessary pipes,

tubes, burners, and apparatus for lighting it with gas. He then applied to the company to furnish him with gas, and tendered five dollars in advance payment therefor. The company, before they would furnish the gas, required the plaintiff to sign what purported to be an agreement, and was at least a promise to take gas according to the terms and conditions contained in the printed "rules and regulations" of the company, which were introduced in evidence. This the plaintiff refused to sign, and for that reason, and none other, the company refused to furnish him with gas. The plaintiff then brought his action to recover damages of the said company for such refusal, in a justice's court, claiming damages to the amount of one hundred dollars, where the defendant obtained judgment and the plaintiff appealed. The county court reversed the judgment of the justice, and gave judgment for the amount claimed and costs. The defendant now brings the case here by appeal to be reviewed.

We understand that this case comes before the court in entire good faith, and with a sincere desire to arrive at the just rights of the parties. It has been argued with great ability and candor on both sides, and we have given the questions involved a consideration beyond what was necessary to determine this particular appeal. Indeed, we were informed upon the argument that it was the desire particularly of the appellants that this court should review their regulations and pass upon their validity. We therefore enter upon an examination of these "regulations," so far as we deem it necessary, not only without embarrassment, but greatly aided by the full and candid arguments which have been submitted.

It is conceded that there are but two questions necessary to be determined: 1. Was the gas company bound to furnish the plaintiff with gas, under the circumstances of preparation and fixtures admitted to have been made, upon his complying with such conditions as the company might rightfully impose? and 2. If so, whether the company could rightfully require the plaintiff to sign the agreement, promise, or regulations mentioned, before he was entitled to demand and have gas supplied by them, upon a tender of the usual rates.

It must be recollected that the fixtures and all apparatus of the plaintiff for receiving and using the gas were perfect, and the only reason for refusing to furnish the gas was that the plaintiff refused to sign the "regulations" prescribed by the company. Although the county judge says that the point involved in the first question was conceded in favor of the plaintiff

on the trial below, yet we do not understand it to be conceded here, and we therefore proceed to examine the question.

That the company were empowered to impose reasonable regulations upon such of the citizens of the city of Milwaukee as might desire to be furnished with gas, we have no doubt. But the question is, whether the citizen, willing to submit and conform to all such regulations as the company might rightfully impose, was entitled to demand of and be supplied with gas by the company. In other words, was not the company bound to sell their gas at the usual rates to all and every citizen of Milwaukee who was prepared by pipes and the necessary fixtures for its consumption and use, upon compliance with such conditions and regulations as the company might rightfully impose?

In considering this question, it is not deemed necessary to examine critically the contract of Lockwood with the city or the charter of the gas company in detail. It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that hence the only means of supply available to the citizens was through the agency of the company. It is within the every-day experience of us all, and hence within the judicial knowledge of the court, that the manufacture and supply of inflammable gas for the purpose of lighting cities, stores, and dwellings is not a domestic or family manufacture. It is carried on either by public or associated capital, and is dependent for its profit upon general consumption. Corporations of this kind are not like trading or manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world. Their product is designed for the consumption of the immediate community in which the manufacture is wrought. It is not a trading corporation, for its product depends exclusively upon home consumption. If gas were an article of merchandise, and could be bottled or packed up, and imported or exported like "soap candles, or hats," to be distributed to the various markets of commerce, there might possibly be claimed for it the character of merchandise, or manufactures partaking of that attribute. But such is not the fact. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. It is local, and hence not commercial. It is consumed upon the spot of its manufacture, and hence can have no affinity with articles of trade. Its success necessarily depends upon its general use in the vicinity of its

manufacture; and seriously affects the public policy and individual convenience of the immediate community. The gas is not sold to whomsoever will buy, but is offered to be and is furnished to whomsoever is prepared to and will take and use it. It is not an article of trade, because it is not bought, measured, and delivered in quantity, but is furnished, used, and to be paid for after it is used, because it cannot be measured before. From the nature of the article, the objects of the company, their relation to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation.

But it is asked, would a soap and candle factory, or a hat or carriage factory, with the privilege of laying pipes in the public streets, make it a public corporation, and oblige the company to furnish soap, candles, or carriages to any citizen upon tender of a fair compensation? Perhaps not. The citizen could procure his soap, candles, and carriages elsewhere. These are all articles of trade, capable of transportation from place to place, and as is sometimes alleged, the incorporation of companies for their manufacture does not interfere with the rights or privileges of private citizens. But suppose the citizen was prohibited from obtaining soap, candles, or carriages from any other than the particular corporation, how would the case stand? Could such company wantonly refuse to sell to the citizen upon the usual terms? However, if these reasons are insufficient to distinguish the character of this corporation, we proceed to examine another, already in part considered, which to our mind is conclusive; viz., the exclusive privilege conferred upon the company to manufacture and furnish or sell the gas.

The very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by the citizens thereof, would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonable terms. And when the nature and objects of the corporation are considered, viz., the exclusive right to manufacture and sell gas for the purpose of lighting the city of Milwaukee, and the dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity? The very term is incompatible with the idea of trade and commerce. It is not in its nature interchangeable, but merely consumable, and consumable only at the place of delivery, in the immediate vicinity of its production. If a company

were chartered with the exclusive privilege of manufacturing and selling bread in the city of Milwaukee, would it be contended that the company were under no obligation to supply or sell bread to any but such person or persons as the company should capriciously select? Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence. The successful operation of this gas company worked a radical change in the mode of lighting the streets, dwellings, and places of business in the city, and created thereby a sort of necessity for the article, to produce which the exclusive privilege was conferred upon them, and hence they assumed the correlative duty of supplying this necessity.

We think there can be no doubt that the company were bound to furnish the gas to the plaintiff, upon his complying with such reasonable conditions or terms as they might rightfully impose. The only reason urged for refusing to furnish the gas to the plaintiff was that he refused to sign the regulations adopted by the company. This leads us to examine those regulations, and to determine whether or not they were such as the company could rightfully require the plaintiff to subscribe to, as a condition precedent to his right to demand the gas.

We shall not attempt to discuss all of these regulations separately, though we are requested so to do; but shall only point out some of them which we think are unreasonable, and which the company had no right to impose. But, before doing so, we wish to be distinctly understood that in our opinion they have a right to make all such needful rules and regulations for their own, and the convenience and security of the public, as are reasonable and just, and to exact a promise of conformity thereto. But these rules and regulations must be reasonable, just, lawful, not capricious, arbitrary, oppressive, or unreasonable. Were it not so, the whole network of pipes and machinery would be at the mercy of the careless, the fraudulent, or the malignant. From the nature of the article produced and used, as well as from the manner of its use, great care is requisite in its management, and there is a kind of implied duty or obligation resting upon those who use the gas to use it in such a manner as not to injure or endanger others who use it. Hence we see no objection to a rule or regulation of the company re-

quiring application for gas to be made in writing, and requiring the applicant to sign reasonable regulations.

The third rule of the company, allowing the company to demand security for the gas consumed, or a deposit of money to secure payment thereof, appears to be just and necessary to guard against loss. As the delivery of the gas is necessarily its consumption, and as the amount delivered is ascertained by the amount consumed, it would seem to be just and right that the company should not be compelled to furnish it without reasonable security for payment in convenient amounts and at proper periods.

The ninth rule is also objected to as illegal. This authorizes the company, by their inspector, to have free access at all times to buildings and dwellings, to examine the whole apparatus, and for the removal of the meter and service-pipe.

The gas apparatus in the buildings, stores, and dwellings is the property of the individual, put up at his own expense, in which the company have no interest. It may be proper for the company to have the right of inspecting the gas apparatus to determine its sufficiency and safety, and at stated periods to inspect the same, or perhaps oftener, upon reasonable notice therefor. But certainly it cannot be necessary that the dwellings of gas consumers should be subject to instantaneous visitation at all times without notice. Nor is it to be conceded that the company should have the right at all times to enter the premises and remove the service and meter at their pleasure. This regulation is too general, and cannot be upheld, or at least a party cannot be required to subscribe to it, to entitle him to be furnished with gas.

Another regulation (14) reserves to the company the right at any time to cut off communication of the service-pipe, if they shall find it necessary so to do, to protect the works against abuse or fraud. Here the company assume the whole power to decide upon the question of abuse or fraud, either in fact or in anticipation, without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case, but upon the most urgent emergency. Much less could it have been the intention to confer such power upon one of the parties to a contract of such vital importance. It is no hardship for the company to resort to the same tribunals upon like process for protection against fraud as the law provides for individuals.

Rule 16 provides that after the admission of gas into the fit-

tings, they must not be disconnected or opened, either for alteration or repairs or extensions, without a permit from the company, which may be obtained at their office, free of expense; and any gas-fitter or other person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby.

It is not to be allowed that the gas company can impose penalties in this way, or make the submission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so; and not him only, but upon any other person who should act in the matter without their consent. The statement of this proposition is its answer.

Rule 17 provides that the company shall have the right to substitute alcohol for water in the meters, and charge therefor. All that is necessary to observe upon this regulation is that the company are entitled to charge for the gas consumed, and that some accurate mode of measurement must be used, whether of alcohol or water. The consumer must pay the legal rates for the quantity consumed; and the mode of measurement, whatever it is, must be correct.

Rule 21 assumes for the company the power to make any other rules or regulations from time to time, under which the gas company will furnish private consumers, as experience shall suggest, etc.

What we have said before as to the power of the company to prescribe reasonable rules and regulations is a sufficient answer to the question raised, or which may be raised thereon.

It is not necessary to go further. Indeed we might have stopped much earlier, and would have done so but for what we understood to be the desire of the parties for a full examination of all the questions involved in this action.

Without recapitulation, we have no doubt that the judgment of the county court was right, and that the judgment ought to be and it is affirmed, with costs.

PUBLIC DUTY OF GAS COMPANIES.—The making and selling of gas is not a prerogative of government, but any person may engage in it without legislative authority: *Jersey City Gas Co. v. Drigat*, 29 N. J. Eq. 242. Gas com-

panies are neither public nor quasi public corporations: *New York C. & H. R. R. Co. v. Metropolitan G. L. Co.*, 5 Hun, 201; *Commonwealth v. Lowell G. L. Co.*, 12 Allen, 75. In the latter case it was contended by counsel that the defendants were a quasi public corporation. But Bigelow, C. J., who delivered the opinion of the court, said: "We fail to see that the defendants can be properly regarded as a corporation of this character. No public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. It is entirely at their own option whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on the business is left to their own election. Nor is any power conferred upon them to take private property, not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right or privilege given them is to dig up public streets and ways for the purpose of laying down their mains or pipes."

DUTY OF GAS COMPANY TO SUPPLY GAS.—Whether or not a gas company is bound, independent of contract or statutory obligation, to supply gas to any person who has made the necessary preparation to receive it, and offered to comply with all the just and reasonable rules and regulations of the company, is a question upon which there seems to be some diversity of judicial opinion. Some cases hold that a gas company, incorporated for the purpose of lighting the streets and buildings of a city or town, is not obliged to supply gas to all persons having buildings situated on the line of its pipes, upon their tendering a reasonable compensation, and agreeing to comply with such reasonable regulations as the company has established: *McCune v. Norwich City Gas Co.*, 30 Conn. 521; *Paterson G. L. Co. v. Brady*, 27 N. J. L. 245; *Hoddeson G. & C. Co. v. Haselwood*, 6 C. B., N. S., 239. In the case of *McCune v. Norwich City Gas Co.*, *supra*, it was decided that, in the absence of any contract express or implied, and where the charter of the company contains no provision on the subject, a gas company is under no more obligation to continue to supply its customers than the vendors of any other commodities. Sanford, J., delivering the opinion of the court in that case, said: "The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it. The relations between the maker and the consumer originate in the contract between them, and their respective rights and obligations are controlled entirely by the stipulations of such contract, and as (where no contract prohibits) the one may refuse to take the article at his pleasure, so may the other at his pleasure refuse to supply it. We discover no reason for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and vendors of other commodities are subjected by the rules of law."

Where, however, a gas company has been awarded the exclusive right and privilege of vending gas in a city during a certain period, it is bound to supply it to all persons who may call for it, upon their paying or offering to pay therefor: *New Orleans G. L. & B. Co. v. Paulding*, 12 Rob. (La.) 378; *Gas Light Co. of Baltimore v. Colliday*, 25 Md. 1. In the latter case it seems that the company was the only one incorporated in the city for the manufacture of gas, and therefore it enjoyed a monopoly in that branch of business. Weisel, J., who delivered the opinion of the court in that case, said: "Those who were induced to fit their houses for the introduction and use of gas could look only to this company for their supply, and it was upon its

proffers, and in accordance with its prescribed terms and rules, that the necessary tubings and fittings were placed in their houses. In considering the question of the obligation of a party or company of this character to continue the supply of gas to a customer, such matters cannot well be overlooked." The late case of *Williams v. Mutual Gas Co.*, 52 Mich. 499, S. C., 50 Am. Rep. 266, goes still further, and holds that a gas company, although it has no exclusive right to supply the city, is bound to supply gas to all persons who require it, upon payment or reasonable security. The reasoning upon which the decision in that case rests seems to be satisfactory and conclusive, and in harmony with modern thought. Sherwood, J., who delivered the opinion, said: "The defendant is a corporation in the enjoyment of certain rights and privileges, under the statutes of the state, and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot therefore be well likened to that of the innkeeper or common carrier, but more nearly approximates that of the telegraph, telephone, or mill owner. . . . This corporation is authorized and permitted to do business in Detroit only upon the ground of public convenience, and that benefits may accrue to its citizens. It is true that neither by the charter of the company, its articles of association, or the by-laws of the city authorizing its existence there, has it the exclusive right to manufacture and sell gas. It is, however, within the experience of us all, and I may say, I think, with great propriety, within the judicial knowledge of the courts, that the manufacture and supply of inflammable gas for the purpose of lighting cities, villages, stores, hotels, and dwellings is not a domestic or family manufacture. It is carried on almost exclusively by public or associated capital; and to make it a paying industry requires the exercise and enjoyment of certain rights and franchises only to be acquired from municipal or state authority. Associations of this kind, as has been well said, 'are not like trading and manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world.' It is not a trading corporation; its product is designed for the citizen; and the extent to which it is used depends upon house consumption in the immediate neighborhood and community in which the manufacture is wrought. It is in the strictest sense a local commodity, and not commercial. It can only be used by consuming it, and hence can have no place with articles of trade. The success of the company greatly depends upon the necessity of the citizens in the vicinity of its location; and its operations may seriously affect the public policy and individual convenience of the community. The nature of the article made, the objects of the company, its relations to the community, and the rights and privileges it must necessarily exercise, give the company a public character, and, to a certain extent, a monopoly, which can never be tolerated only upon the ground of some corresponding duty to meet the public want. . . . The duty of the company toward the citizens and that of the citizen toward the company is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the courts."

Section 11 of the English act of 1871 provided that a gas company, on being required so to do, should give and continue to supply gas for any prem-

ises within twenty-five yards of their mains, and under such pressure in the mains as should be prescribed. It was held that the company was bound not only to supply gas at the required pressure, but also to all who came within the description contained in the act: *Commercial Gas Co. v. Scott*, L. R. 10 Q. B. 400. And in *People ex rel. Kennedy v. Manhattan G. L. Co.*, 45 Barb. 136, it was decided that a gas company which possesses, by virtue of its charter, powers, and privileges which others cannot exercise, and upon which is imposed the statutory duty to furnish gas on payment of all moneys due by the applicants, may be compelled by *mandamus* to furnish gas to persons who have the right to receive it, and who offer to comply with the general conditions on which the company supplies others.

GAS COMPANY IS BOUND TO EXERCISE SUCH CARE, SKILL, AND DILIGENCE in all its operations, and in the transaction of all branches of its business, as is called for by the delicacy and difficulty of the nature of its business: *Chisholm v. Atlantic G. L. Co.*, 57 Ga. 28; *Holly v. Boston G. L. Co.*, 8 Gray, 123; S. C., 69 Am. Dec. 233; *Emerson v. Lowell G. L. Co.*, 3 Allen, 410; *Butcher v. Providence Gas Co.*, 12 R. I. 149; *Dillon v. Washington G. L. Co.*, 1 McArthur, 626. Merrick, J., in delivering the opinion in the case of *Emerson v. Lowell G. L. Co.*, *supra*, said: "It was the duty of the defendants, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying the community with light for private habitations, and for other places devoted to public or private use, to exercise due care and diligence in keeping it constantly under their control, and preventing it from escaping into a dwelling-house or place of business where the inmates or occupants are in such cases involuntarily subjected to its effects, whether they are positively injurious or merely disgusting and offensive. But if its effect is noxious, as well as disagreeable, that is a reason why the diligence required to take care of and control it should be still more active and unremitting." As a gas company is in charge of a dangerous material, it is bound itself to exercise due care proportioned to the risk, and also to use similar care in preventing careless interference with its pipes by others. If the earth about its pipes is disturbed by others in constructing sewers in the streets, it is bound to see that the earth so disturbed is put back again so as to afford sufficient support for its pipes; and if it fails to do this, and the gas escapes from its pipes and passes through the sewers into the houses of others, the company will be liable for the injuries caused thereby: *Butcher v. Providence Gas Co.*, 12 R. I. 149. So when the company tears up a public street to lay its pipes, it is bound to put the street into as good condition as it was in before it disturbed it, and to exercise careful foresight so as to prevent injury afterward, which might be occasioned by storms and rainfalls, and which would render the work dangerous to persons traveling on the street. And it is no defense to an action for injuries sustained by falling into a trench imperfectly filled that the municipal authorities had approved and accepted the work: *Dillon v. Washington G. L. Co.*, 1 McArthur, 626.

Gas companies are bound to supply pipes of sufficient strength to stand all lawful uses to which the public streets in which they are laid may be put, and they are responsible for all damages resulting from the breaking of the pipes in consequence of such use: *Brown v. New York G. L. Co.*, Anth. 351. They are also bound to repair all leaks in their pipes as soon as they are discovered, and if they fail to perform this duty, they will be liable for damages resulting therefrom: *Hunt v. Lowell G. L. Co.*, 3 Allen, 418; *Brown v. New York G. L. Co.*, Anth. 351; *Schermerhorn v. Metropolitan G. L.*

Co., 5 Daly, 144; *Lennen v. Albany G. L. Co.*, 44 N. Y. 459; *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1; *Burrows v. March G. & C. Co.*, L. R. 5 Ex. Cas. 67; affirmed in 7 Id. 96. A gas company is bound to close its service-pipes when it disconnects its supply to a customer, and if injury results from its failure to perform this duty, it will be liable for damages caused solely by such neglect: *Lanigan v. New York G. L. Co.*, 71 N. Y. 29. A gas company is also bound to keep up such reasonable inspection of its mains and pipes as will enable it to detect when there is such an escape of gas, from imperfection of the pipes, as may lead to danger of explosion: *Moore v. Hastings & St. L. G. Co.*, 4 F. & F. 324. Gas companies are bound to prevent deleterious substances from escaping from their manufactories upon the premises of their neighbors: *Carhart v. Auburn G. L. Co.*, 22 Barb. 297; *Pottstown Gas Co. v. Murphy*, 38 Pa. St. 257. And they have no right to use the gutters and drains of a city to carry off the fetid, infectious, and poisonous waters produced by the manufacture of gas: *Municipality No. 1 v. Gaslight Co.*, 5 La. Ann. 439.

GAS COMPANY CANNOT REFUSE TO FURNISH GAS to a person because he refuses to pay a former bill, or a bill contracted in different premises: *Gas Light Co. of Baltimore v. Colliday*, 25 Md. 1; *Lloyd v. Washington G. L. Co.*, 1 Mackey, 331. Nor can it shut off the gas on the ground that there are arrears due from a former occupant of the premises: *Morey v. Metropolitan G. L. Co.*, 38 N. Y. Super. Ct. 185. Nor can it refuse to supply a person with gas on the sole ground that he refuses to sign an agreement which it has no legal right to compel him to sign: *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318.

GAS COMPANY IS NOT BOUND TO FURNISH SEPARATE METER for each floor of a house, unless the owner or occupant puts in separate or independent service-pipes to connect with the meter: *Ferguson v. Metropolitan G. L. Co.*, 37 How. Pr. 189. Nor is it bound to place stop-cocks in its pipes outside of the building of its customer, unless the statute imposes that duty upon it: *Holden v. Liverpool N. G. & C. Co.*, 3 C. B. 1. But gas companies may be required to make, at their own cost, such changes in the location of their pipes as the public convenience or safety requires: *Matter of Petition of Deering*, 93 N. Y. 361. When a dispute arises between the company and a consumer, the latter is entitled to have his rights determined by the courts, and the company will be enjoined from cutting off the gas until the case is tried: *Sickles v. Manhattan G. L. Co.*, 64 How. Pr. 33; 66 Id. 304, 314.

CROCKER v. BELLANGER.

[6 WISCONSIN, 645.]

DISTINCTION BETWEEN VOID DEED AND ONE WHICH IS VOIDABLE ONLY is important to observe; for, while nothing can pass by a deed absolutely void, one which is voidable only may be the foundation of a good title in the hands of one who has taken a conveyance in ignorance of the fraud which makes the deed voidable.

DEED OBTAINED BY FRAUDULENT REPRESENTATIONS OF GRANTEE IS NOT ABSOLUTELY VOID, but voidable only at the election of the grantor; but the subsequent conveyance by him of the same land to another person is not the exercise of such election, and does not have the effect of avoiding the former deed.

TO AVOID DEED ON GROUND OF FRAUD PRACTICED BY GRANTEE upon the grantor, the latter must institute some proceeding to which the former shall be a party, and a subsequent purchaser from the grantor cannot set up the alleged fraud to defeat the first grantee's title.

RIGHT OF GRANTOR TO AVOID DEED ON GROUND OF FRAUD practiced upon him by the grantee cannot be transferred to another so as to enable the transferee, on that ground, to attack the grantee's title.

BILL in equity to stay proceedings at law in some eighty actions of ejectment commenced and prosecuted by Bellangee against the plaintiff Crocker and others. The bill alleged, among other things, that in July, 1854, one Edward W. Casey, then and still a resident of New Bedford, Massachusetts, owned the land in question, which was then worth ten thousand dollars. That the defendant Bellangee, a resident of the city of Milwaukee, where the lands in question are, on the fourth day of July, 1854, went to the house of said Casey in New Bedford, and there made to him a variety of false representations, calculated to deceive, in reference to the location, character, and value of the lands. That Casey, relying upon these representations, and being thereby deceived, was induced to convey the lands to Bellangee for the grossly inadequate consideration of fifty dollars. That these representations made by Bellangee to Casey were willfully false and were made with intent to deceive. That on the fifteenth day of February, 1855, said Casey and his wife, by deed duly executed, assigned, transferred, and conveyed to the plaintiff, his heirs and assigns, all his (Casey's) interest in the premises in controversy, and authorized the plaintiff as such assignee to pay back to Bellangee the said sum of fifty dollars so paid to him by said Bellangee; and that the plaintiff, as such assignee, tendered said sum to the defendant, with the interest due thereon, but he refused to accept the same. The bill prayed that the deed from Casey and wife to Bellangee be declared illegal, fraudulent, and void, and that it be decreed to be delivered up and canceled; and that he be restrained from prosecuting the suits above named. The defendant demurred to the bill, on the following among other grounds: That the right to rescind or avoid the conveyance by Casey to Bellangee, on the ground of alleged false and fraudulent representations made by Bellangee, is personal to Casey himself, and he alone could file a bill for such purpose. The right to sue in such case is not the subject of transfer. And that the deed from Casey and wife to the complainant is void for barratry, champerty and maintenance. The court sustained the demurrer, and the plaintiff appealed.

J. S. Brown and Ogden, for the appellant.

O. H. Waldo, for the respondent.

By Court, WHITTON, C. J. One of the principal questions presented in this case is, whether the complainant (Crocker) is in a situation to avail himself of the alleged fraud of Bellangee upon Casey.

Admitting that Bellangee practiced a fraud upon Casey which would have enabled the latter to set aside the deed, does the subsequent conveyance by Casey to Crocker enable him to avail himself of the same fraud?

It is contended by the counsel for Crocker that the deed from Casey to Bellangee, having been obtained by fraud and imposition, is void for all purposes, and that consequently no title passed by it; or that, if not void absolutely, it is void at the option of the party defrauded, and that in either case, a court of equity will interfere and rescind it.

On the other hand, it is contended by the counsel for Bellangee that, admitting the deed to have been obtained from Casey by the false and fraudulent representations of Bellangee, it is not absolutely void, but voidable only on motion of the party defrauded.

It is said by the supreme court of Massachusetts, in deciding the case of *Somes v. Brewer*, 2 Pick. 184 [13 Am. Dec. 406], that "between the grantor and grantee in such cases, the technical difference between void and voidable is wholly immaterial. Whatever may be avoided may in good sense to this purpose be called void, and this use of the term 'void' is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons, the distinction is highly important, because nothing can be founded upon a deed which is absolutely void, whereas, from those which are only voidable, fair titles may flow. These terms have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them." It seems to us that there is great truth in the remarks above quoted.

There is found a great want of precision in many of the authorities, the terms "void" and "voidable," as applied to deeds, being often used indiscriminately. While it is true that nothing can pass by a deed absolutely void, a deed which is voidable only may be the foundation of a good title in the hands of one who has taken a conveyance in ignorance of the fraud. The distinction, therefore, between a void deed and one which is

voidable only, it is quite important to observe. We are of the opinion that the deed from Casey to Bellangee (admitting it to have been obtained by a fraud practiced by the latter upon the former) was not absolutely void, but voidable only, at the election of Casey: See *Somes v. Brewer*, above referred to, and the cases there cited; *Osterhout v. Shoemaker*, 3 Hill (N. Y.), 513. But it is claimed by the complainant that if the deed from Casey to Bellangee was voidable at the option of Casey, the act of Casey in conveying the land to Crocker was the exercise of this option, and had the effect to avoid the deed to Bellangee and to convey the title to Crocker. We do not see how this effect can be given to the deed to Crocker. This effect would have followed if the deed had been given to defraud prior or subsequent purchasers of the land, because the statute declares that such conveyances shall be void as against such purchasers: R. S., c. 75, sec. 1.

But it seems to us that something more was necessary to be done in this case than to convey the land to another purchaser in order to avoid the first deed. It must be remembered that the title was conveyed to Bellangee, subject to be defeated by Casey if the deed was obtained from him by fraud.

Now, we cannot see how a conveyance to Crocker could have the effect to divest Bellangee of his title. The title being in him, some proceedings must be had, to which Bellangee was a party, in order to divest him of the title he acquired by his deed.

The cases referred to by the defendant have satisfied us that the proper course for Casey to pursue was to avoid the deed by a bill in equity against Bellangee. But we do not see how the complainant Crocker can be permitted to set up the fraud of Bellangee in obtaining his deed, for the reason that he acquired no title to the land by his conveyance, if the views above expressed are correct.

It will be seen that we have expressed no opinion upon the subject of the fraud alleged to have been practiced upon Casey by Bellangee, the view we have taken of the matter rendering an opinion upon that subject unnecessary.

The order of the circuit court is affirmed.

DEEDS VOID AND VOIDABLE: *Hanby v. Tucker*, 68 Am. Dec. 514, note 517; *Grimsley v. Hooker*, 67 Id. 227; *Sydnor v. Roberts*, 65 Id. 84; *Hempstead v. Johnston*, Id. 458; *Veasy v. Graham*, 63 Id. 228; *McCaskey v. Graff*, 62 Id. 336, note 340; *Gant v. Hunsacker*, 55 Id. 408, note 411-415; *Trimble v. Turner*, 53 Id. 90; *Chess v. Chess*, 21 Id. 350; *Wait v. Maxwell*, 16 Id. 391, note 393. As to the consequences to third persons, the distinction between void

and voidable deeds is important: *Bromley v. Goodrich*, 40 Wis. 140; *Johnson v. Brewers' F. I. Co. of America*, 51 Id. 575, both citing the principal case. A deed obtained from the grantor through fraudulent representations made by the grantee is not void, but voidable only at the election of the grantor; and a subsequent conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; but in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party. The subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title: *Graham v. Railroad Co.*, 102 U. S. 156, citing the principal case. The assignee of a party defrauded cannot avoid a conveyance for the fraud perpetrated upon the grantor: *Milwaukee & M. R. R. Co. v. Milwaukee & W. R. R. Co.*, 20 Wis. 183, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

GODFREY v. STATE.

[31 ALABAMA, 323.]

INFANT BETWEEN SEVEN AND FOURTEEN YEARS OF AGE IS PRIMA FACIE INCAPABLE OF COMMITTING CRIME; but this presumption may be overcome by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability.

INDICTMENT for murder. The prisoner, who was a slave of about the age of eleven, was accused of killing a child four years old, whom he nursed. The evidence showed that the child had been cut on the face and head with a sharp instrument, and its body dragged some distance to a hogshead of water, where it was lying in a wet condition. A hatchet which had been washed, but on which were still traces of blood, was found. The prisoner was bloody, and his clothes were wet. He had, according to one witness, threatened, in a fit of anger, on the day before the child was killed, to kill the child; and on the day of the killing, according to another witness, he had said that he had killed the child, although he asserted to still other witnesses that an Indian had committed the deed. The prisoner appeared to be a smart, intelligent boy. The charge of the city court of Mobile, before whom the prisoner was tried, is given in the opinion. The jury returned a verdict of guilty, but the case was reserved for the opinion of the supreme court on the question of the correctness of the charge of the court.

By Court, WALKER, J. The single point to be considered in this case is, whether the charge of the court below to the jury was correct. An analysis of that charge shows that the jury were distinctly instructed that the defendant, being between

seven and fourteen years of age, was *prima facie* incapable of committing crime; that to overturn the intendment in favor of his incapacity to commit crime, the jury must be convinced, from the evidence, beyond a reasonable doubt, after allowing due consideration to the fact that the accused was a negro and a slave, that he knew fully the nature of the act done, and its consequences; and that he showed plainly intelligent design and malice in the execution of the act. This charge, after an anxious and careful examination of it, we cannot pronounce erroneous.

An infant above seven but under fourteen years of age is presumed not to have such knowledge and discretion as would make him accountable for a felony committed during that period. But if that presumption is met by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability, the reason for allowing an immunity from punishment ceases, and with it the rule which grants such immunity ceases. There are many cases where children between those ages, being shown to have been cognizant of the criminal nature of the act done, have been punished under the criminal law. A girl thirteen years of age was executed for killing her mistress. Two boys, one nine and the other ten years of age, were convicted of murder because one of them hid himself and another hid the dead body, thus manifesting, as was supposed, a consciousness of guilt, and a discretion to discern between good and evil. A boy of eight years of age, who had malice, revenge, and cunning, was hanged for firing two barns. A boy ten years old who showed a mischievous discretion was convicted of murdering his bed-fellow: 4 Bla. Com. 23, 24.

In the case of *Rex v. Owen*, 4 Car. & P. 236, it was referred to the jury to determine whether the act of a girl ten years old, alleged to constitute a larceny, was known by her to be wrong when it was done; and upon that question she was acquitted. It is said in Hale's Pleas of the Crown, p. 22, that one between the ages of seven and fourteen might be convicted of a capital offense, "if it appeared by strong and pregnant evidence and circumstances that he was perfectly conscious of the nature and malignity of the crime." In an American case the same principle is thus stated: "If it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and have judgment of death:" *State v. Aaron*, 4 N. J. L. 231 [7 Am. Dec. 592]. In that case a negro boy, who was a slave, of eleven years, was convicted of

murder; but a new trial was granted on account of an erroneous ruling as to the competency of a witness, and it does not appear what further was done in the case.

In the case of *State v. Guild*, 10 N. J. L. 163 [18 Am. Dec. 404], a negro slave of less than twelve years was convicted of murder; and the report of the case informs us that the defendant was executed. In that case, the court, dissenting from the cautious statement of the law found in 1 Hale P. C. 27, permitted a conviction upon confessions. In this case, although a confession was given in evidence, the facts proved established the guilt of the accused so clearly that it is fairly inferable that no importance was attached to it by the court or jury, and its effect is not noticed in the charge. The question whether a conviction could be had upon confessions does not arise, and we do not commit ourselves to the doctrine of the decision last above cited upon that point.

All the authorities concur in maintaining the correctness of the propositions of law involved in the charge: Bishop Crim. L., secs. 283-285; 1 Archb. Crim. Pl. 3-5, and notes; 1 Russell on Crimes, 3-5; Roscoe's Cr. Ev. 942, 944; Whart. Crim. L. 51; note to *People v. Teller*, 1 Wheel. 231-234. Reason, humanity, and the law alike required that the court should, in its charge, throw around the jury every guard and restriction necessary to prevent an improper conviction in such a case. This has been carefully done by the court in this case, and we are bound to pronounce a full approval of the charge.

The judgment of the city court is affirmed, and its sentence must be executed.

INFANT'S RESPONSIBILITY FOR CRIME.—The well-settled rule of the common law was that an infant under the age of seven was conclusively presumed to be incapable of committing a crime. This changed to a *prima facie* presumption of incapability between the ages of seven and fourteen, while above fourteen no presumption at all existed in his favor. The fixing of these ages was certainly arbitrary, and perhaps the only real value of the distinctions was, as suggested in *State v. Aaron*, 4 N. J. L. 231, S. C., 7 Am. Dec. 592, 601, to ascertain the party upon whom the proof of legal capacity lies. These ages of capacity are in some states changed by statute: See *Wusnig v. State*, 33 Tex. 651; *State v. Barton*, 71 Mo. 288; *State v. Adams*, 76 Id. 355.

INFANT UNDER AGE OF SEVEN.—The rule that an infant under the age of seven cannot be guilty of a crime was laid down by the old authorities, and has been repeated to the present day: 1 Hale P. C. 27; 1 Hawk. P. C. 2; Dalt. Just., c. 147; 4 Bla. Com. 23; 1 Archb. Crim. Pl., c. 1; 1 Russell on Crimes, 1; Broom's Legal Maxims, 232; 1 Whart. Crim. L., sec. 67; Whart. Crim. Ev., sec. 801; 1 Bishop Crim. L., sec. 368. Thus a child two years old cannot be a vagrant: *Rex v. Inhabitants of King's Langley*, 1 Stra. 631; nor can an infant

one or two years old be made criminally answerable for a nuisance erected upon its lands: *People v. Townsend*, 3 Hill (N. Y.), 479; and a plea of felony is no answer to an action for false imprisonment brought for the arrest of an infant under the age of seven years: *Marsh v. Loader*, 14 C. B., N. S., 535. This doctrine, it seems to us, is not by any means satisfactory. While a presumption of incapability should undoubtedly exist in the infant's favor, varying in strength with age, this presumption should not be conclusive; for an infant under the age of seven may have sufficient intelligence to comprehend the nature and consequences of his act, and on proof of this fact, he should be made to suffer accordingly.

INFANT BETWEEN AGES OF SEVEN AND FOURTEEN.—Between the ages of seven and fourteen an infant is likewise deemed incapable of committing a crime, but this presumption is only *prima facie*, and consequently evidence of capacity may be given, and where it appears that a child within these ages is *capax doli*, he may be punished. The following decisions, in addition to the authorities before cited, maintain this proposition: *State v. Goin*, 9 Humph. 175; *State v. Doherty*, 2 Overt. 80; *State v. Pugh*, 7 Jones L. 61; *Commonwealth v. Mead*, 10 Allen, 398; *Irby v. State*, 32 Ga. 496; *Stage's Case*, 5 City H. Rec. 177; *People v. Kendall*, 25 Wend. 399; S. C., 37 Am. Dec. 240; *Hill v. State*, 63 Ga. 578; S. C., 36 Am. Rep. 120; *Regina v. Vamplew*, 3 F. & F. 520; *Regina v. Manley*, 1 Cox C. C. 104. This presumption undoubtedly decreases in strength with the progress of years: See *State v. Aaron*, 4 N. J. L. 231; S. C., 7 Am. Dec. 592; *Law v. Commonwealth*, 75 Va. 885; S. C., 40 Am. Rep. 752. A number of cases are given in the old books. Thus in Dalt. Just., c. 147, it is said that an infant of the age of eight may commit homicide, if it may appear that he had knowledge of good and evil, and of the peril and danger of that offense. An infant of the age of nine killed his companion of like age, confessed the felony, and was adjudged to be hanged, but judgment was respite in order that he might obtain a pardon: 1 Hale P. C. 27; Fitz. Rep. Cor., 57 B; and in *Spigurnel's Case*, 1 Hale P. C. 26, Fitz. Rep. Cor., 118, an infant ten years old was also convicted of killing his companion, and it appearing that he could discern between good and evil, he was hanged. In *Alice de Walborough's Case*, 1 Hale P. C. 26, Fitz. Rep. Cor., 118, a girl of the age of thirteen was convicted of killing her mistress, and was burned. A boy between eight and nine years of age was found guilty of burning two barns, and it appearing that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly: 1 Hale P. C., Emlyn's ed., 25, note n. In *Commonwealth v. Mead*, *supra*, Bigelow, C. J., after stating the general doctrine, says: "This rule is uniformly applied in cases where children under fourteen and above seven years of age are charged with murder or other felonies. *A fortiori* is it applicable where they are accused of lesser offenses, or with the commission of acts coming within the class of *mala prohibita*. These do not so violently shock the natural, moral sense or instinct of children, and would not be so readily recognized and understood by them to be wrong, or a violation of duty, as the higher crimes of murder, arson, larceny, and the like."

The capacity of an infant between the ages of seven and fourteen to commit a crime must, then, be satisfactorily shown by the state to warrant his conviction: *Rex v. Owen*, 4 Car. & P. 236; *Rex v. Smith*, 1 Cox C. C. 260; *People v. Davis*, 1 Wheel. 230; *Walker's Case*, 5 City H. Rec. 137; *Willet v. Commonwealth*, 13 Bush, 230; *State v. Adams*, 76 Mo. 355; *State v. Fowler*, 52 Iowa, 103; *Angelo v. People*, 96 Ill. 209; S. C., 36 Am. Rep. 132; but see *State v. Arnold*, 13 Ired. L. 184. This capacity is always a question of fact:

State v. Leonard, 41 Vt. 585; and may be determined from the circumstances of the case; independent evidence of capacity is not essential: *State v. Toney*, 15 S. C. 409.

RAPE BY INFANT BETWEEN AGES OF SEVEN AND FOURTEEN.—In England a distinction is observed, however, between crimes generally and those depending upon physical capacity. A boy under the age of fourteen cannot, at the English law, commit the crime of rape, nor be guilty of an assault with intent to commit rape, the law conclusively presuming that it is impossible for him to complete the offense: *Rex v. Eldershaw*, 3 Car. & P. 396; *Rex v. Groombridge*, 7 Id. 582; *Regina v. Philips*, 8 Id. 736; *Regina v. Jordan*, 9 Id. 118; *Regina v. Brimilow*, Id. 366; S. C., 2 Moo. 122. No evidence is, therefore, admissible to show that he could, in point of fact, commit the crime: *Regina v. Philips*, *supra*; and under the age of fourteen he cannot be convicted, even though it be proved that he has arrived at the full age of puberty: *Regina v. Jordan*, *supra*. In such cases he may, notwithstanding, be convicted of a common assault: *Rex v. Eldershaw*, *supra*; *Regina v. Brimilow*, *supra*.

In the United States, no distinction is justly made between the crime of rape and any other crime. "An infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it; but that presumption may be rebutted by proof that he has arrived at the age of puberty, and is capable of emission and consummating the crime: *Williams v. State*, 14 Ohio, 222; S. C., 45 Am. Dec. 536; *Hiltabiddle v. State*, 35 Ohio St. 52; S. C., 35 Am. Rep. 592; *People v. Randolph*, 2 Park. Cr. 174; *Commonwealth v. Green*, 2 Pick. 380; *Wagoner v. State*, 5 Lea, 352; S. C., 40 Am. Rep. 36; *contra*: *State v. Sam*, Winst. L. 300; and see *State v. Handy*, 4 Harr. (Del.) 566. The burden is on the state to prove capacity, and a statute providing that "carnal knowledge or sexual intercourse shall be deemed complete upon proof of penetration only," does not change the rule: *Hiltabiddle v. State*, *supra*. Proof that a male infant, under the age of twelve, put his hand over the mouth of a girl, while his elder brother attempted to commit a rape upon her, is not sufficient to warrant his conviction as principal in the second degree: *Law v. Commonwealth*, 75 Va. 885; S. C., 40 Am. Rep. 750.

INFANTS OVER AGE OF FOURTEEN.—Infants over the age of fourteen are equally liable with adults for the commission of crimes, and no presumption of incapacity exists in their favor. "Where," says Blackstone, "there is any notorious breach of the peace, a riot, battery, or the like (which infants when full grown are at least as liable as others to commit), for these an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one:" 4 Bla. Com. 22. A boy of fourteen or fifteen years of age may therefore be convicted of an assault to commit rape, where the rule is recognized that under that age he is incapable of committing the crime: *State v. Handy*, 4 Harr. (Del.) 566. An infant under the age of twenty-one is liable to bastardy proceedings: *Chandler v. Commonwealth*, 4 Metc. (Ky.) 66, 68. He may commit treason, and thus subject his estate to forfeiture: *Den ex dem. Boyd v. Banta*, 1 N. J. L. 266.

CONFESSIONS OF INFANTS.—The confessions of an infant between the ages of seven and fourteen are admissible against him if there be no other objection than infancy: *Rex v. York*, Fost. 70; S. C., 1 Ben. & H. Lead. Cas. 68; *Rex v. Wild*, 1 Moo. 452; *State v. Guild*, 10 N. J. L. 163; S. C., 18 Am. Dec. 404. Thus in a case where a girl twelve years old was indicted for arson, the court said: "If she has such mental capacity as renders her amenable to the law

for commission of crime, she has sufficient mental capacity to make a confession of her guilt:" *State v. Bostick*, 4 Harr. (Del.) 563; but there being a doubt in this case whether her confession was not made more under the influence of hope than from a consciousness of guilt, it was held that it should be rejected. So "with respect to confessions in general, and especially with respect to the confessions of infants, it is necessary to be exceedingly guarded:" *State v. Aaron*, 4 N. J. L. 231; S. C., 7 Am. Dec. 592, 596. It was therefore held that upon his mere naked confession, an infant under the age of twelve cannot be convicted of a capital offense.

PARENT'S COMMAND TO CHILD WILL NOT JUSTIFY CRIMINAL ACT done in pursuance of it: 1 Bishop Crim. L., sec. 367; *People v. Richmond*, 29 Cal. 414. But if unauthorized sales of intoxicating liquor are proved to have been made by a child under the age of fourteen years, in the presence of and in obedience to the express command of her mother, this fact of itself has some tendency to show that the child did not understand that the act which she was told by the parent to commit was wrong, and requires full and explicit instructions on the subject of legal competency to commit crime: *Commonwealth v. Mead*, 10 Allen, 398.

PUNISHMENT.—It will be observed from the foregoing that age makes no difference in the degree of punishment which may be inflicted upon an infant for a crime which he commits. In addition to the instances given above, it may be said that in *Regina v. Vamplew*, 3 F. & F. 520, a child under the age of fourteen was convicted of manslaughter, and sentenced to twelve years of penal servitude. In *Stage's Case*, 5 City H. Rec. 177, infants were indicted for larceny, and convicted and sentenced to the state prison for three years. While in *State v. Guild*, 10 N. J. L. 163, S. C., 18 Am. Dec. 404, a boy twelve years of age was convicted and executed for the crime of murder.

INFANT'S LIABILITY FOR TORTS: See this question discussed in the note to *Humphrey v. Douglass*, 33 Am. Dec. 179.

CROMMELIN v. THIESS.

[31 ALABAMA, 412.]

YEARLY TENANT HOLDING OVER AFTER EXPIRATION OF TERM IS PRESUMED TO HOLD UNDER RENEWAL OF LEASE if there be no evidence to the contrary, and is presumed to hold for the time and on the terms of the original lease.

PRESUMPTION OF RENEWAL OF LEASE BY TENANT MERELY HOLDING OVER IS REBUTTED by proof of a new contract materially different from the original lease, and this, notwithstanding the new contract, is void by the statute of frauds, because verbal, and not to be performed within a year from the making thereof.

PAROL AGREEMENT FOR LEASE IS VOID if for one year and the term is to commence at some future day.

YEARLY TENANT HOLDING OVER AFTER EXPIRATION OF TERM IS TENANT AT WILL, when there is a void parol agreement for a lease differing materially from the terms of the original lease, and such tenancy may be terminated at any time by the tenant quitting the premises, or by the landlord's demand for possession.

TENANT AT WILL IS LIABLE FOR RENT ONLY DURING ACTUAL OCCUPATION, in an action for use and occupation after the tenant has quit the premises; but if during the occupation the landlord brings a real action, he may recover damages for use and occupation to the time of the verdict.

TENANT MAY SUBLET LEASED PREMISES when the lease contains no stipulation against subletting, and the property may be used for any purpose not inconsistent with the terms of the lease.

TENANT IS EXONERATED FROM LIABILITY TO PAY RENT BY ANY INTERFERENCE BY LANDLORD which deprives the tenant of the right of enjoyment of the premises to the full extent guaranteed by the lease, and for such interference the tenant may abandon the premises.

REFUSAL OF CHARGE IS NOT ERRONEOUS when it is abstract and is not in every particular authorized by the law and justified by the evidence in the particular case.

ACTION to recover five hundred dollars for the use and occupation of a store-house in the city of Montgomery, from October 1, 1854, to April 1, 1855. The defendants leased a store of the plaintiff by a written lease from October 1, 1853, for one year, for one thousand dollars, payable quarterly, and occupied the same as a drug store. Just before the expiration of the year the parties to the lease made a parol agreement for a lease of the same premises for another year, to commence on October 1, 1854, for one thousand dollars. There was no restriction of the defendants in the use of the store, and in the summer of 1854 they agreed to sublet the same to one Joseph for a grocery store for one year, commencing October 1, 1854, at the time when the parol lease was to take effect. When the plaintiff was informed of this arrangement, he strenuously objected to the use of the store for a grocery, and forbade Joseph to occupy it as such, whereupon the defendants told the plaintiff to take his store and rent it himself, and the plaintiff replied that the law would settle the matter between them. Some time in the beginning of November, 1854, after the expiration of their written lease, the defendants moved out of the plaintiff's store, and it remained vacant thereafter until October 1, 1855, the defendants retaining the keys until in September, 1855, when they sent them by a third person to the plaintiff, and by whom they were delivered in October following. In January, 1855, the defendants claimed to have control of the store, and tried to rent it to one Nettles, but did not succeed. The plaintiff never demanded the keys, nor sought to regain possession of the leased property until after October 1, 1855. The fourth charge given by the court and excepted to by the plaintiff was to the effect that the plaintiff's forbidding the defendants from subletting the premises, and the subtenant from using them as a grocery store, author-

ized the defendants to terminate the lease, and their offer to give back the store, although refused by the plaintiff, did in law terminate the lease, and the plaintiff could only recover the rent for the time that the defendants actually used and occupied the store. The second instruction asked by the plaintiff and refused by the court was to the effect that if the jury found that the defendants agreed to sublet the store to Joseph for one year from October 1, 1854, and the plaintiff forbid them from subletting, and Joseph from occupying it, and that thereupon the defendants offered the plaintiff back his store, which he refused to take, this would not in law be a surrender of the lease. The third charge requested by the plaintiff, and also refused, was to the effect that the offer to surrender by the defendants' vendor as above detailed would not exonerate them from the payment of rent from the time of such offer. The fourth charge requested by the plaintiff, and likewise refused, was to the effect that the plaintiff's interference with the renting to Joseph would not deprive him of the right to recover rent from the time of such interference. The fifth charge requested by plaintiff, and also refused, was to the effect that if the defendants retained possession of the store after the plaintiff's interference with the renting of it to Joseph, and until the latter part of October, 1854, and retained the keys until September, 1855, and offered to rent it in January, 1855, then they would not be entitled to set up the plaintiff's interference against the payment of rent. In consequence of the rulings of the court, the plaintiff was compelled to take a nonsuit, and he now moves to set this aside.

Goldthwaite and Semple, for the appellant.

Watts, Judge, and Jackson, contra.

By Court, RICE, C. J. The most important question for consideration is, On what terms shall the defendants be considered as holding after the expiration of the first lease?

If there was no evidence explanatory of the holding over after the expiration of that lease, the case would be a plain one for the plaintiff. For it is a settled rule that where a party having held under a lease for a year, at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there be no evidence to the contrary, that he holds for the time, and on the terms of the original lease. But here we have evidence to the contrary; and in a case like the present, "the terms on which he continues to occupy are matter of evidence rather

than of law:" *Mayor etc. of Thetford v. Tyler*, 8 Ad. & El., N. S., 95; Chit. Cont., ed. of 1851, 287, and authorities cited in note m; *Diller v. Roberts*, 13 Serg. & R. 60 [15 Am. Dec. 578].

Here it appears that, not long before the expiration of the original lease, the parties made a new contract for a second year, to commence from the first day of October, 1854. The new contract was materially different from the original lease, in this, that the new contract does not, like the original lease, provide for quarterly payments. The law is, that rent from a yearly tenant is payable yearly, unless otherwise agreed: Chit. Cont. 284, note t. The new contract, thus made and thus differing from the original lease, destroys the implication of the renewal of the original lease from an unexplained holding over. That new contract is void as a lease by the statute of frauds because it was verbal, and was not to be performed within a year from the making thereof: Code, sec. 1551; Chit. Cont. 67; yet it was good evidence to explain the holding over, and to show that it was not upon the terms of the original lease: Chit. Cont. 283, note q. It shows that, but is not operative to create any title of tenancy. The other circumstances set forth in the bill of exceptions which occurred between the making of the new contract and the day in October on which the defendants completed the removal of their drugs, etc., from the store very plainly show that the holding over was really not upon the terms of the original lease. In fact, it is clear from all the evidence (if it is believed) that after the expiration of the original lease the defendants did not hold under any valid express agreement, nor upon the terms of the original lease; that they were in by no title of tenancy whatever, but held at the will of the plaintiff, in the strictest sense of the word; and that he on any day after the termination of the original lease, whilst they continued in possession, might, by a demand of possession, have determined the will, and thereupon have instituted against them what the code calls "a real action," in which he could have recovered, not only the store itself, but damages "for the possession or use and occupation" "to the time of the verdict:" Code, sec. 2207; *Doe ex dem. Hollingsworth v. Stennett*, 2 Esp. 717; *Goodtitle v. Herbert*, 4 T. R. 680; *Doe ex dem. Bastow v. Cox*, 11 Ad. & El., N. S., 122.

It may be true that if at any time after the holding over commenced, and before it terminated, the plaintiff had received from the defendants rent, as rent, for any portion of that time, or had done any other act, which, in law, would have amounted on his part to such a recognition of the defendants as his ten-

ants, as to have precluded him from recovering against them in such a "real action" as we have above mentioned, then he might in such an action as the present treat them as tenants from year to year. But nothing of that kind appears to have been done; and we need not therefore now decide what its effect would have been if it had been done: See Chit. Cont. 287, and other authorities cited *supra*. In the absence of anything of that kind, the defendants could not, by their mere act, such as retaining the keys and offering to rent the store to Nettles, vest in themselves a term as yearly tenants, nor incur the liabilities of such tenants for rent.

Upon the evidence, if it be true, the defendants held, after the expiration of the original lease, as tenants at will, and had the right to determine their holding by quitting the premises: Addison on Cont., ed. of 1857, 342, 343.

If it were conceded that the defendants, after the expiration of the original lease, held as yearly tenants, the concession would be fatal to the present action, because, upon that concession the suit was commenced, and the complaint filed before the expiration of the year, and before any rent could have been considered as due for that year.

As the case for the plaintiff is now presented by the evidence, it rests only upon "a principle resulting from the nature of an action for use and occupation (and sanctioned by section 2206 of the code), namely, that he who holds my premises, without an express bargain, agrees to pay what a jury may find the occupation to be worth:" *Mayor etc. of Thetford v. Tyler*, 8 Ad. & El., N. S., 95; Addison on Cont. 371; *Abeel v. Radcliff*, 15 Johns. 507. "An actual personal occupation is not necessary to sustain the action, when the lessee (that is, a tenant for a term under an agreement) has entered and taken possession, and the term has become vested in him, as he 'holds' within the words of the statute (Code, sec. 2206), although he does not occupy." For as against such a tenant, who has once entered, and become vested with the term, a recovery of the rent for the entire term may be had, without any other proof of use and occupation than such entry by him, although it may appear that he afterwards quitted the premises long before his term expired: Addison on Cont. 371, and note i, referring to *Baker v. Holtsaffell*, 4 Taunt. 45, and other cases. But as against a mere tenant at will, who has no term vested in him, who has made no express agreement, who had the right to determine his holding by quitting the premises, and who has exercised that right, the

owner of the premises cannot recover more than the actual occupation was worth, in an action for use and occupation; although if he had elected during the occupation to have brought a "real action," he might in it have recovered damages for the use and occupation to the time of the verdict.

But if it were conceded that the holding over of the defendants was as tenants from year to year, and that the yearly term had become vested in them, still it is clear that the said term could lawfully be created, and was created without writing. It might therefore be terminated without writing: Addison on Cont. 386. There was no stipulation or agreement that the store should not be used as a grocery store, nor that it should not be sublet. The tenants had therefore the right to sublet it as a grocery store, and to the quiet enjoyment of the store, either by personal occupation or by the exercise of that right; and any interference by the landlord, which deprived them of the right of enjoyment of the store to the full extent secured to them under the lease, would authorize the tenants to abandon the premises, and thereby exonerate themselves from the liability to pay rent imposed upon them by the contract. But if they failed to abandon within a reasonable time, or did any act inconsistent with the right to abandon, they would thereby waive that right: *Dyett v. Pendleton*, 8 Cow. 727; *Lawrence v. French*, 25 Wend. 443; *Jackson v. Eddy*, 12 Mo. 209; *Burn v. Phelps*, 1 Stark. 94; *Ludwell v. Newman*, 6 T. R. 458; *Edwards v. Etherington*, Ry. & M. 268.

Under the views above presented, it is certain that the fourth charge of the court could not have injured the plaintiff in this action. Construing that charge in connection with the evidence, we understand "the lease" which it mentions to be the verbal lease which we have above declared void. As that lease was void by the statute of frauds, and the defendants had the right to treat it as a void lease, the plaintiff could not have been injured, but might have been benefited, by the instruction which made the right of the defendants to terminate it dependent on the interference of the plaintiff, and their offer to give back the store. That lease did not vest any term in the defendants. And as we understand that charge to relate only to it, we cannot say that there was any error in that part of it which limited the recovery of "the rent" to "the time that defendants were actually in possession of said store." If retaining the keys and offering to rent to Nettles amount to a continuation of the holding of the store by the defendants (as to which we do not decide),

they amount to a continuation of the actual possession of the store, and would therefore have been embraced in the charge as given.

The first charge asked was given. The second was abstract; and therefore there was no error in refusing it, even if otherwise unobjectionable. The third, fourth, and fifth assume that the plaintiff had made out at least a *prima facie* case, and must recover unless defeated by the matters stated in them respectively. That assumption alone authorized their refusal, even if in all other respects they were faultless. There never is error in refusing a charge which is not in every particular authorized by the law and justified by the evidence in the particular case: *Carmichael v. Brooks*, 9 Port. 330.

We find no reversible error in this case, and must affirm the judgment.

TENANT HOLDING OVER IMPLIEDLY HOLDS UNDER COVENANTS OF ORIGINAL LEASE: *Vrooman v. McKaig*, 59 Am. Dec. 85, and is a tenant by sufferance; *Whaley v. Whaley*, 40 Id. 594; or at will: see note to *Overdeer v. Lewis*, 37 Id. 441, and cases in this series then cited.

PAROL LEASE FOR YEAR TO COMMENCE IN FUTURO IS GOOD, under New York statute of frauds: *Young v. Dake*, 55 Am. Dec. 356, and cases cited in the note.

REMEDY OF OWNER, WHERE LESSEE OCCUPIES UNDER VOID AGREEMENT, with his consent, is an action for use and occupation: *Anderson v. Critcher*, 37 Am. Dec. 72; *Abeel v. Radcliff*, 7 Id. 377; and to sustain the action, actual occupancy is not indispensably necessary: *Little v. Martin*, 20 Id. 688. See the note to *Fitzgerald v. Beebe*, 46 Id. 289, for a general discussion of the action for use and occupation.

REFUSAL OF CHARGE IN ABSTRACT IS NOT ERROR: *Cowles v. Bacon*, 56 Am. Dec. 371; *Benham v. Rowe*, Id. 342; *Cole v. Sprowl*, Id. 696; *Pennington's Ex'rs v. Yell*, 52 Id. 262; *Zachary v. Pace*, 47 Id. 744; *McDaniel v. Steele*, Id. 93, and the note thereto collecting prior cases in this series; and the court need not charge upon a point not arising upon the evidence: *Harvey Thomas*, 36 Id. 141, and prior cases in this series cited in the note; *Marshall v. Hancy*, 59 Id. 92; *Johnson's Ex'x v. Jennings' Adm'r*, 60 Id. 323; *Duggins v. Watson*, Id. 500.

DARGAN v. MAYOR ETC. OF MOBILE.

[31 ALABAMA, 439.]

MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES FOR INJURY RESULTING FROM NEGLIGENT OFFICIAL CONDUCT of one of its officers in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation.

MUNICIPAL CORPORATION IS NOT LIABLE TO OWNER OF SLAVE NEGLIGENCELY KILLED BY PEACE-OFFICER in attempting to arrest him for violating an ordinance forbidding slaves to be abroad at night without lawful permission; such an ordinance is within the political powers of the municipality, and the employment of the officer the necessary means for execution of the power, and from its nature not susceptible of supervision by the municipality.

MINISTERIAL OFFICERS ARE FREE FROM CONTROL OF CORPORATION in executing ordinances which are of a public nature and for public purposes.

CASE for two slaves negligently killed by the city guard of Mobile. The complaint alleged in substance that the slaves were abroad at night and absent from the plaintiff's premises, in violation of an ordinance of the city of Mobile, and were liable to be seized and arrested by the defendants' officers, and that while arresting them the city guards carelessly and negligently injured them so that from the injuries so received they died. A demurrer to the complaint having been sustained, the plaintiff appealed.

E. S. Dargan, pro se.

Daniel Chandler, contra.

By Court, WALKER, J. The corporation of the city of Mobile had authority to pass ordinances providing for the arrest and punishment of slaves abroad in the city after nine o'clock at night without written permission; or assembling in numbers of four or more, off the owner's premises, without the permission of the mayor or one of the aldermen: See the charter of the city, in Pamphlet Acts of 1843-4, p. 180, sec. 15. This power was purely political in its character, and exclusively for the benefit of the public. As to that power, the corporation was a government *imperium in imperio*. The employment of the officer, for whose negligence in the discharge of his duty the corporation is sued, was the necessary, proper, and authorized means for the execution of that power; and the action of the officer, from its nature, was not susceptible of supervision by the corporation: See sec. 37 of charter. In the legislative adoption of the ordinances described in the pleading, and in the appointment of the officer, the corporation exercised a lawful authority. It is not alleged that the corporation was guilty of any negligence or misconduct in the selection of the officer.

The question here is not as to the liability of a corporation for the omission to discharge its duty; nor for the performance of an unlawful act by it or its authority; nor for the exercise of a power not delegated; nor for the negligence of its agents or

officers in the performance of an act for the private benefit of the corporation, or done under the immediate supervision of the corporation. The question of this case is, whether a municipal or public corporation is liable in damages for an injury resulting from the careless or negligent official conduct of one of its officers, in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation. This question we decide in the negative.

Because the corporation is, as to the passage of the ordinances and the appointment of the officer described in the pleadings, a government, exercising political power, it is irresponsible for the official misconduct alleged, upon the same principle which generally protects governments and public officers from liability for the misfeasances and malfeasances of persons necessarily employed under them in the public service: Story on Agency, secs. 819, 819 a, 819 b, 820, 821; Paley on Agency, Dunlap's ed., 876. Municipal corporations *quoad hoc* stand upon the same foundation with public officers, counties, townships, and other quasi corporations charged with some public duty, or invested with some portion of the authority of the government, where the employment of officers is necessary and lawful.

The only one of the authorities cited by the appellant which possibly sustains his position is *Johnson v. Municipality No. 1*, 5 La. Ann. 100. In the case of *Thayer v. Boston*, 19 Pick. 511 [31 Am. Dec. 157], the corporation was held to be liable for an injury produced by the unlawful act done under its authority, of obstructing the public highway. It was decided in *Rochester White Lead Co. v. City of Rochester*, 8 N. Y. 463 [53 Am. Dec. 816], that a city corporation was responsible for injury resulting from the unskillful and careless manner in which a sewer was constructed. That case draws the distinction between judicial and ministerial duties; recognizes the adoption of the ordinance for the construction of the sewer as a judicial, and its actual construction as a ministerial, duty; and holds the corporation responsible for the discharge of the latter. The duty of constructing the sewer was discharged by the corporation itself, through its employees; the work was under the supervision and control of the corporation; and the law devolved upon it an obligation to complete the work with reasonable skill and care. In those particulars that case differs from this. The ministerial duty of executing the ordinances described in the declaration

was one which, from its very nature, had to be discharged by officers performing each particular act free from the control and supervision of the corporation. The arrest of slaves violating those ordinances is an act of nature kindred to the arrest of criminals by the sheriff or marshal. The postmaster-general is not responsible for the official misconduct of his deputies, because their duties are of a public nature and for public purposes, and a supervision of their acts is impracticable: Story on Agency, sec. 818. Municipal corporations must have the benefit of the same principle, for it is as applicable to them as to any officer of the government.

In the case of *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369 [55 Am. Dec. 847], the liability of the corporation for an injury resulting from the negligence of persons employed in the repair of a sewer was placed upon the ground that the duty of repairing sewers was private, and the corporation was responsible for the negligence of its agents in the discharge of its private, but not of its public, duties. We are not sure that the duty of the corporation in that case was appropriately classed as private, or that the decision itself was correct in departing from the principle of *Rochester White Lead Co. v. City of Rochester*, *supra*. But if the doctrine of that case were applied to this, it would be fatal to the action; for the duty of arresting slaves under the ordinances of the corporation was clearly and exclusively public, and for the benefit of the public.

The supreme court of New York did not go so far in the case of *Bailey v. Mayor etc. of New York*, 8 Hill (N. Y.), 531 [38 Am. Dec. 669], as it did in the subsequent cases which we have noticed above. In that case the liability of the corporation for the misconduct of its agents and officers is limited to that class of cases where they are employed about its private interests; as, for instance, in the improvement of its private property. The principle there laid down would exempt from responsibility for injuries resulting from the negligence of the employees of the corporation in works upon the public streets and sewers. The same case was before the court of errors: *Mayor etc. of New York v. Bailey*, 2 Denio, 433; and there Chancellor Walworth held that the city of New York was liable for an injury done by the washing away of the dam across the Croton river, upon the ground that the land upon which the dam was situated belonged to the corporation, and it was the duty of the proprietor of the land to see that it was so used as not to become noxious to the occupiers of property below.

In *Pack v. Mayor etc. of New York*, 8 N. Y. 222, it was decided that a city corporation was not liable for injuries occasioned by the workmen of a contractor with the corporation for grading the street. In *Delmonico v. Mayor etc. of New York*, 1 Sandf. 222, it was decided, without a discussion of the principle involved, that the city was responsible "for the negligence, unskillfulness, or malfeasance of its agents and contractors engaged in the construction of its public works:" See also *Mayor etc. of New York v. Furse*, 3 Hill (N. Y.), 612. That case is distinguishable from this in the same particulars with the case of the *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463 [58 Am. Dec. 816].

In North Carolina municipal corporations are held to be liable for damages accruing from the unskillful and incautious manner in which a public street was graded: *Meares v. Commissioners of Wilmington*, 9 Ired. L. 73 [49 Am. Dec. 412]. In a very able opinion, it is argued that the improvement of the streets by grading is really for the private benefit of the corporators, although the public derive an incidental benefit. There is nothing, however, in that opinion which sanctions the proposition that the arrest of slaves abroad at unreasonable hours, or congregating in dangerous numbers, is an act for the private benefit of the corporation. It contains nothing in conflict with the idea that the authority to do such an act is, like the administration of the criminal law, in promotion of the public safety and morals, and therefore public in its nature, although the particular community may be specially benefited.

The case of *McCombs v. Town Council of Akron*, 15 Ohio, 474, does not touch the principle of this case, it goes to the extent of making a corporation responsible for an injury by the lawful and authorized grading of the street to an adjoining proprietor, but does not touch the question of liability for the negligence of an officer necessarily employed beyond the supervision of the corporation in the arrest of violators of its ordinances. The decision in *City of St. Louis v. Gurno*, 12 Mo. 414, does not touch the question here, but is in conflict with the decision of the Ohio court.

The case of *Johnson v. Municipality No. 1*, 5 La. Ann. 100, is the case which we conceded in the outset of this review of authorities might sustain the position of the appellant. In that case the municipality was subjected to the payment of damages caused by the neglect of the keeper of the police jail to advertise the imprisonment of a runaway slave. It is possible that that

case may be distinguished in the susceptibility of the jailer's conduct of supervision. But, it is unnecessary that we should pause to make such a distinction. The same court in the subsequent case of *Stewart v. City of New Orleans*, 9 Id. 461 [61 Am. Dec. 218], held that the corporation was not liable for the negligence of the watch in the arrest of a slave, whereby the slave was killed. That case was strikingly similar to this, and involved the same principle. It asserts the doctrine that municipal corporations enjoy the exemption of government from responsibility for its own acts, and the acts of its officers deriving their authority from the sovereign power, whenever it exercises powers which it possesses for public purposes, and which it holds as a part of the government of the country.

The following language is used by Mr. Justice Cowen in the case of *Martin v. Mayor of Brooklyn*, 1 Hill (N. Y.), 545: "It [a municipal corporation] is a political body, bound, I admit, and liable to an action, when incurring a debt through its corporate officers, acting within the line of their duty; but not for either misfeasance or non-feasance committed by independent corporate officers:" *Fox v. Northern Liberties*, 8 Watts & S. 103.

Our review of the authorities shows that there is no great uniformity of decision as to the principle which governs the liability of municipal corporations for the misfeasances and malfeasances of their agents. None of them, however, are in conflict with the doctrine laid down by us as controlling the decision of this case, unless we so regard the case of *Johnson v. Municipality No. 1*, 5 La. Ann. 100, from which all weight as an adverse authority is taken away by the subsequent decision of the same court. Having decided this case without involving the points of contest among the decisions, it is not incumbent upon us to attempt to harmonize them, or to pass our judgment upon any of them as expositions of the law. We have stated and decided the question of the liability of the appellee upon the circumstances of the case. We do not inquire, and do not mean to decide, whether the concurrence of all the circumstances from which the exemption from liability in this case is deduced is indispensable to the conclusion we have attained. We decide this case upon grounds which we conceive perfectly safe and sound, and we leave any future case which may not be identical with it to be met when it may arise.

The judgment of the court below is affirmed.

MUNICIPAL CORPORATION'S LIABILITY WITH RESPECT TO ITS PUBLIC GOVERNMENTAL POWERS: See *Lorillard v. Town of Monroe*, 62 Am. Dec. 120, and note collecting other cases; *Stewart v. City of New Orleans*, 61 Id. 218, and note thereto collecting the prior cases in this series. This latter case is in all respects similar to the principal case. The rule exempts municipal corporations from liability in all cases of injury caused by the negligence of their officers when they are independent of municipal control, and were appointed in obedience to a statute, and the injury was inflicted by them while in the performance of a public service not peculiarly local or corporate, unless they are made liable by express legislative enactment: *Symonds v. Supervisors of Clay County*, 71 Ill. 357; *Greenwood v. Louisville*, 13 Bush, 229; *City of Richmond v. Long's Adm'r*, 17 Gratt. 382, all citing the principal case.

BLISS v. ANDERSON.

[31 ALABAMA, 612.]

COURT OF CHANCERY HAS JURISDICTION, AT SUIT OF STOCKHOLDER, TO RESTRAIN CORPORATION from issuing certificates of deposit with the intent that they should circulate as money when it has no authority so to do, and such issue would subject it and its officers to losses and penalties, and involve a violation of its charter.

POWER TO ISSUE CERTIFICATES OF DEPOSIT, WITH INTENT THAT THEY SHOULD CIRCULATE AS MONEY, IS NOT WITHIN CHARTER which confers upon an insurance company the power to receive money in trust or on deposit, and "to give acknowledgments for deposits in such manner and form as they may deem convenient and necessary to transact such business." Such power to issue paper for circulation as money is not expressly given in the charter, and when not expressly given in corporate charters, is forbidden by section 1484 of the Alabama code.

BILL IN EQUITY IS INSUFFICIENT which seeks to restrain the directors of an incorporated company from issuing certificates of deposit which show upon their face that they were intended to circulate as money, unless there is an allegation in the bill that they were intended, when issued, to circulate as money. It is not a conclusion of law from the face of the certificates that the purpose of their issue would be that they might circulate as money, but is an inference of one fact from another, which may be overcome by countervailing evidence.

BILL in equity by a stockholder against the directors of an incorporated insurance company. A demurrer to the bill was overruled, and there being no answer filed, the bill was ordered to be taken as confessed, and the defendants appealed. The other facts are stated in the opinion.

John A. Elmore and S. F. Hale, for the appellants.

Turner Reavis, contra.

By Court, WALKER, J. Sections 3268, 3269, and 936 of the code are in the following words: "Any person, private corpora-

tion, or association who, without authority of law, makes or emits any paper to answer the purposes of money, or for general circulation, such person, and each individual of such corporation or association, on conviction, must be fined not less than twenty or more than one hundred dollars, and may be imprisoned not more than twelve months." "Any person in this state who signs any paper to be put in circulation as money, except under the authority of this state, or countersigns the same, must, on conviction, be fined in a sum not less than one hundred or more than five hundred dollars; and the signature of such person to any such paper must be taken as genuine unless the fact of signing be denied on oath by the defendant." "Every bill of exchange, note, bond, or instrument of any description, whatever may be its form or device, issued with the intent to circulate the same as money, without authority of law, is an absolute, unconditional promise of the association or person putting such bill, note, or other instrument in circulation, and may be sued on by the holder thereof without transfer or assignment, and without demand, protest, or notice, and the amount thereof recovered, with interest thereon at the rate of fifty per cent per annum from the date thereof, or from the time the same was put in circulation."

From these statutes, it is manifest that the issue of paper by the Gainesville Insurance Company, with the intent that it should circulate as money, without the authority to do so, would subject it and its active officers to losses and severe penalties, as well as involve a violation of its charter. If the corporation was about to do that thing which would be attended by such consequences, the court of chancery had jurisdiction to interpose its preventive power at the instance of a stockholder: *Dodge v. Woolsey*, 18 How. 831-841; *Christopher v. Mayor of New York*, 13 Barb. 567.

This case, then, turns upon the question whether the bill shows that the corporation is about to issue, without authority, certificates of deposit, with the intent that they should circulate as money. In the solution of this question, two points of controversy are presented; 1. As to the power of the corporation to make such issues with such intent; and 2. As to the sufficiency of the bill to show the intent.

1. In determining the extent of the corporate authority, it is proper to look to a law, found in the code, which was in force before the adoption of the act of incorporation. The law alluded to is as follows: "No private corporation, to which such

powers are not expressly given, shall, by any implication or construction, be deemed to possess the power of discounting bills, notes, or other evidences of debt, of receiving deposits, of buying and selling gold, silver, bullion, or foreign coin, or of issuing bills, notes, or other evidences of debt, upon loan, or for circulation as money:" Code, sec. 1484. This statute must operate in the construction of the charters of all private corporations adopted after its enactment: *Branch Bank etc. v. Jones*, 5 Ala. 487; *Angell & Ames on Corp.*, 3d ed., 239, 240; *People v. Utica Ins. Co.*, 15 Johns. 358 [8 Am. Dec. 243].

But it is said that the legislature could repeal that statute, and have done so in effect, so far as this corporation is concerned, in the charter. No provision of the charter expressly repeals that statute. If the charter, when considered alone, and without reference to any other law, would merely authorize the "implication or construction" that the corporation had the power to issue paper for circulation as money, it would not effect an exemption from the prohibitory section of the code above copied, or operate a repeal of it as to the particular corporation. Corporations which would otherwise have the power, by implication or construction, are those which the prohibitory section of the code is designed to restrict. If it does not restrict such corporations, it has no effect, and is virtually repealed by the contingency in which it was designed to exert its force. It is, then, only necessary to inquire whether the charter expressly grants the power in question; for if it does not, there is no repeal or modification of the prohibitory section of the code, so as to secure an exemption from the restriction of that section.

The only section of the charter supposed to bear on this question is in the following words: "The said company shall be authorized to receive, in trust or on deposit, all funds or moneys that may be offered to them, whether on interest or otherwise; and that they have power to give acknowledgments for deposits in such manner and form as they may deem convenient and necessary to transact such business; all such moneys so deposited being free from loss or indebtedness, growing out of the insurance business of said company." The power to issue paper for circulation as money is not, in this extract from the charter, given by name; and we think it demonstrable that it is not included in any of the express powers named.

The authority to give acknowledgments of deposits in such "manner and form" as the corporation might deem convenient, undoubtedly clothes it with a discretion as to the manner and

form of the acknowledgments. But that discretion is not unlimited. It is limited by the scope of the power conferred: *City Council of Montgomery v. Montgomery and Wetumpka Plank Road Co.*, 81 Ala. 76; *Beaty v. Knowler*, 4 Pet. 152-171; *People v. Utica Ins. Co.*, 15 Johns. 358 [8 Am. Dec. 243]. The power is to receive deposits and give acknowledgments, in manner and form convenient and necessary to transact the business of receiving deposits. The discretion of the corporation is in the selection of the manner of the instruments by which it will execute the power of receiving deposits, and it must be exercised within the area of that power. It cannot be exercised for the purpose of giving their certificates of deposit a circulation as money, because their power is to act as a depository, and to give acknowledgments as evidences of deposit, and they have no power to emit paper to answer the purposes of money. The charter itself limits the discretion to a manner and form convenient and necessary in the transaction of the business of a depository. The power of issuing certificates of deposit is distinct and distinguishable from that of issuing paper for circulation as money. Certificates of deposit may be somewhat assimilated to paper money in their susceptibility of transfer; but they are different, and the discrimination between them is as easy as between ordinary promissory notes and bank bills. The power to issue paper which may be transferred is not a power to issue paper to circulate as money. If the corporation should issue its certificates of deposit in a manner and form to procure for them a circulation as money, it would issue them in a manner and form not merely convenient and necessary to transact the business of a depository, but to transact that business, and also the additional and distinct business of emitting paper to answer the purposes of money. The corporation may issue its certificates of deposit in any manner and form which will accomplish its business of a depository, but not in such manner and form as will accomplish that and another business. If it can so fashion its certificates of deposit as to procure for them a circulation as money, it can add to its granted powers by an ingenious device, and obtain by subterfuge an authority which legislative caution withheld from it. The corporation has not the authority to issue paper to answer the purposes of money, or to give its certificates a form and semblance which will accomplish that object.

2. The question still to be considered is, whether the bill of complainant shows that the corporation was about to issue paper to answer the purposes of money. The allegation is.

that certain engraved forms of certificates of deposits, specimens of which are attached as exhibits to the bill, and made parts of it, were adopted by the board of directors, and show upon their face that they were intended to pass from hand to hand as money, or in lieu of money. The pleader does not say that the certificates were intended when issued to circulate as money; but that the engraved forms manifest upon their face the intent. Is that so? Is the intent a legal conclusion from those engraved forms, and from the fact that they are about to be filled up and emitted?

The engraved forms are in the similitude of bank notes, and have the vignette and other embellishments characteristic of bank notes. Their amounts are designated, as the denominations of bank notes, by marginal letters and figures. They are numbered and lettered as bank notes; are to be signed by the president, and countersigned by the secretary; are for amounts of one, two, and three dollars, payable to bearer on the return of the certificate, which is, in effect, the same as if they were payable, like bank notes, on demand; and, in addition to all this, they are printed on bank-note paper. They differ from bank bills only in the fact that they purport to be certificates of deposit, and are redeemable in bills of specie-paying banks. From these evidences, patent upon the faces of the engraved forms, a chancellor, in passing like a juror upon the facts, would infer the fact that they were intended to answer the purposes of money. Every characteristic which could contribute to procure for them a circulation as money, without the abandonment of the name of certificates of deposit, has been given to them; and then their small amounts clearly indicate the intention that they should issue for sums not adapted to represent singly an entire amount deposited but suitable for circulation as money. The authorities fully maintain the proposition that the intent as a fact might be inferred from such testimony: *Safford v. Wyckoff*, 1 Hill (N. Y.), 15; S. C., 4 Id. 442; *Smith v. Strong*, 2 Id. 241; *Hazellon Coal Co. v. Megargel*, 4 Pa. St. 824; *Attorney-General v. Life and Fire Ins. Co.*, 9 Paige, 470.

But the inference of the intent would be but the inference of one fact from another. It is not sufficient in chancery pleading simply to aver the evidence from which a required fact might be inferred, although the evidence itself, if uncontradicted and not overcome by opposing proof, might be sufficient to induce a chancellor or a jury to find the fact from it: *Knight v. Vardeman*, 25 Ala. 262; *Costillo v. Thompson*, 9 Id. 937; *Ogletree v.*

State, 28 Id. 701; *Oliver v. State*, 17 Id. 597. The averment of the evidence afforded by the engraved forms, although unopposed it might justify the conclusion of the necessary fact that the intent existed, cannot be substituted for the averment of that fact. That evidence is not the requisite fact. It but produces that combination of probabilities from which disputed facts are inferred, and may be overcome by countervailing evidence: *Carter v. Anderson*, 4 Ga. 517.

The averment that the engraved forms show the intent is a statement that such is the conclusion of law. The correctness of such a statement the demurrer does not have the effect of admitting: *Story's Eq. Pl.*, sec. 452; *Carter v. Anderson*, *supra*. It is not a conclusion of law from the face of the certificates that the purpose of their issue would be that they might circulate as money. The averment of the bill is, therefore, insufficient to show the intent; consequently the bill does not contain equity, and the demurrer should have been sustained.

The decree of the court below is reversed and the cause remanded.

RIGHT OF STOCKHOLDER TO SUE CORPORATION: *Hodges v. New England Screw Co.*, 53 Am. Dec. 624, and the note thereto discussing the subject at length; *Brown v. Van Dyke*, 55 Id. 250; *Smith v. Poor*, 63 Id. 672; *Sears v. Hotchkiss*, 65 Id. 557; *Treadwell v. Salisbury Mfg. Co.*, 66 Id. 490, and the note thereto.

CORPORATION HAS ONLY SUCH POWERS AS ARE GRANTED BY ITS CHARTER: *Dugan v. Bridge Co.*, 67 Am. Dec. 464; *Commonwealth v. Erie etc. R. R. Co.*, Id. 471, and the cases cited in the note thereto; *Penobscot Boom Corporation v. Lamson*, 33 Id. 656, and the note thereto collecting prior cases in this series.

INSURANCE COMPANY CAN DO NO BANKING BUSINESS, where its franchise is a grant of power as an insurance and trust company only: *Ohio Life Ins. & Trust Co. v. Merchants' etc. Co.*, 53 Am. Dec. 742; *Blair v. Perpetual Ins. Co.*, 47 Id. 129; and the powers of corporations cannot be exercised for purposes foreign to their creation: *Rivanna Navigation Co. v. Dawsons*, 46 Id. 183; *State v. Commissioners of Mansfield*, 57 Id. 409; as to what incidental powers a corporation has, see the note to the last case, collecting prior cases.

STEELE v. MCTYER'S ADMINISTRATOR.

[31 ALABAMA, 667.]

DECLARATIONS OF DEFENDANTS IN ACTION AGAINST COMMON CARRIER FOR NEGLIGENCE ARE NOT ADMISSIBLE, when the declarations sought to be introduced are statements of facts, which, at the time of giving instructions to the master of his flat-boat not to take any freight until he reached a certain point in the river, the defendant stated as reasons for not taking a full cargo until after reaching the designated point; as, while the

instructions given to the master may be admissible, yet it is not permissible to make their admissibility a pretext by which to obtain the benefit of declarations as to facts made at the same time.

OWNERS OF FLAT-BOAT HOLDING THEMSELVES OUT AS READY AND WILLING TO RECEIVE FREIGHT from the public generally are common carriers, although only making a single trip, and receiving a part of a cargo only; and the receipt of freight by the master of the boat, in violation of the instructions of the owners, does not affect their liability as common carriers. But if they did not hold themselves out as ready and willing to receive freight from the public generally, but only proposed to take the freight of particular persons with whom engagements were made, they are not common carriers; and the persons shipping freight under receipt from the master of the boat, in violation of the private instructions of the owners, cannot hold them liable as common carriers for loss of the goods.

EVIDENCE THAT DEFENDANTS HAD BEEN, IN FORMER YEARS, ENGAGED IN TRANSPORTATION FOR PUBLIC GENERALLY IS ADMISSIBLE and proper for the consideration of the jury in determining the question whether they were common carriers; but it would not necessarily be conclusive. **WRECK OF FLAT-BOAT UPON SUNKEN LOG IN RIVER IS NOT LOSS FROM "ACT OF GOD;"** the human agency directing the boat against the log being the immediate and direct cause of the loss, and such loss is classed among the dangers of the river.

PAROL EVIDENCE IS ADMISSIBLE OF CUSTOM EXISTING ON PARTICULAR RIVER EXEMPTING FLAT-BOATMEN from losses caused by the dangers of the river, although the bill of lading contains no such exception; but to constitute a good custom, it is requisite that it should have been uniform, and so generally known and acquiesced in, and so well established, that the parties must be presumed to have contracted with reference to it.

CASE by William McTyer against John C. Steele, William Hendrix, and William S. Hanna, as common carriers, for damages for the loss of cotton shipped on a flat-boat of the defendants from a point on the Cahaba river, in Bibb county, to Mobile. On the first trial of this case, the plaintiff was compelled to take a nonsuit, and this court, on a former appeal, set the same aside and remanded the case. The cotton was received on board of the flat-boat by Steele, as master of the boat, and a bill of lading was given by him, which contained no exemption from liability for losses from dangers of the river. After the cause was remanded, the defendants Hendrix and Hanna pleaded *non est factum* to the bill of lading, and the court sustained a demurrer to the plea, but refused to visit the demurrer on the declaration. The boat upon which the cotton was shipped was a new one, and had been brought down the river by Steele, as master or pilot. The plaintiff's cotton, together with some belonging to one Massey, was loaded at a point on the river in Bibb county. The cargo was completed at Lockett's landing in Perry county,

by placing on board cotton belonging to one Lockett and one Nave. The boat was afterwards run against a log, several feet of which projected above the water. There was evidence to show that there was room enough to pass on either side of the log in safety, and several old river pilots testified that its presence was well known, and that its position could easily have been determined by the ripple caused by the part submerged. Evidence on the part of the defendants was introduced, showing that the boat was properly constructed and manned by experienced river men, and that Steele was a skillful pilot and of many years' experience on this river; that the place near where the boat was wrecked was one of difficult navigation; that immediately after successfully passing a dangerous place, an officer on the boat cried out that all was safe, and Steele thereupon gave way on his oar, and the boat swinging around struck the log, no one on the boat having seen it until after the boat struck; that one of the oarsmen testified that he saw the boiling of the water over the root of the log, but this was some distance from where the boat struck, and did not show how the log lay. Evidence was also introduced by the defendants tending to show that it was customary for these flat-boats to make but one trip down, and that their freight was engaged beforehand, and no other was taken, except when requested. The captain or manager of the boat took freight from the banks and receipted for it when hailed, on the way down, making no regular stops, and inviting none to ship freight on the boat; and that when Mobile was reached the boats were either sold for lumber or fuel. Hendrix and Hanna were the owners of the flat-boat, and Steele was only their pilot; and the owners had engaged to take Lockett's cotton to Mobile on a contract made prior to the loading, but the rest of the cargo was taken on board without any previous contract. Several witnesses were examined on behalf of the defendants, and testified to the existence of a custom on this river exempting the owners of flat-boats from liability for losses which occurred from the dangers of the river, whether such exemption was contained in the bill of lading or not; but other witnesses on behalf of the plaintiff testified that although they had been engaged in running flat-boats on this river for many years, they had never known of any such custom. The court, among other things, instructed the jury that there was not before them sufficient evidence to establish a custom which exempted the defendants from liability for losses from dangers of the river, when the bill of lading contained no exemption for liability for

such losses. The third instruction asked by the defendants, and refused by the court, was to the effect that if this boat was constructed and procured for the purpose of making a single trip, and that its cargo was engaged beforehand, and that there was no evidence that the defendants were bound to receive any cotton that might be offered to them on tender of the payment of freight, that then they were not common carriers, and not responsible as such. The sixth instruction asked by the defendants, and refused by the court, was to the effect that if Hendrix and Hanna were not engaged in the business of common carriers in Bibb county at the time the plaintiff's cotton was taken on board, but had engaged a load for it below on the river in Perry county, and that if Steele was merely their pilot, and received the plaintiff's cotton on board in Bibb county, contrary to the instructions of Hendrix and Hanna, then these latter were not liable, unless they adopted the contract with full knowledge of it. The defendants appeal, and assign as error all the adverse rulings of the court, and the refusal to give the charges requested. The other facts are stated in the opinion.

Brooks and Garrott, for the appellants.

William M. Byrd and J. R. John, contra.

By Court, WALKER, J. In the argument of appellants' counsel, no defect in the declaration is pointed out, and none has been detected by us. We decide, therefore, that there was no error in the failure to visit upon the declaration the demurrer to the defendants' plea.

That one of the defendants, after the disaster to the boat, offered, under the circumstances stated, to pay two dollars per bale for the services of a steamboat in saving and freighting the cotton to Mobile, was not evidence for the exclusion of which the appellants can complain, and there was no error in rejecting such evidence.

The court permitted the defendants to prove that instructions were given by one of the owners to the master of the boat that he should not take on board any cotton until he got to Lockett's landing, a point below that at which the plaintiff's cotton was received; and it was then proposed to show that in the same conversation the master was informed that a load was engaged at Lockett's landing and at points below on the river, and that that was the reason why it was desired he should receive no cotton above Lockett's landing. This latter proof the court properly rejected; for, conceding that it was competent to prove

the previous engagement of a load at and below Lockett's landing, it was not permissible to make the proof by the introduction of the defendants' declarations. If the defendants had a right to give in evidence the instructions to the master of the boat, it was not permissible for them to make that a pretext by which to obtain the benefit of declarations as to facts made at the same time.

The American decisions are conflicting as to what constitutes a common carrier. We have examined those as well as many English cases, and, without reviewing them, we announce our conclusions. If the appellants built or procured a flat-boat with which to carry cotton down the Cahaba river, and thence to Mobile, though only for a single trip, and held themselves out as ready and willing to carry cotton on their boat for the people generally who wished to send their cotton to Mobile, then they would be common carriers, and those who placed cotton upon the boat could not be affected by any private instructions which might have been given to the master of the boat as to the point on the river above which he was to take on no cotton. On the contrary, if the appellants did not hold themselves out as ready and willing to carry cotton for the public generally, to the extent of a proper load for the boat, or in other words, did not constitute themselves the servants of the public in that business, but only proposed to take the cotton of some particular persons, with whom engagements were made, they were not common carriers. If the appellants, having engaged a part of the loading for the boat, held themselves out as ready to carry for any person or persons to the extent of the remaining capacity of the boat, then they would be liable as common carriers to such persons as availed themselves of such offer of their services to the public generally as carriers. These questions, under the proof, should have been left to the jury, and the court erred in not giving the third and sixth charges asked. We cite the authorities bearing on this branch of the case: 1 *Parsons on Cont.* 639; 2 *Kent's Com.* 598, 599; *Edwards on Bailments*, 425-432; *Dwight v. Brewster*, 1 *Pick.* 50 [11 *Am. Dec.* 133]; *Robinson v. Dunmore*, 2 *Bos. & Pul.* 417; *Satterlee v. Groat*, 1 *Wend.* 272; *Jackson's Case*, 1 *Hayw.* 14; *Gisbourn v. Hurst*, 1 *Salk.* 249; *Ward v. Green*, 6 *Cow.* 173 [16 *Am. Dec.* 437]; *Johnson v. Midland Ry Co.*, 4 *Exch.* 367; *Campbell v. Morse*, *Harp. L.* 468; *Samms v. Stewart*, 20 *Ohio*, 69 [55 *Am. Dec.* 445]; *Coggs v. Bernard*, 1 *Smith's Lead. Cas.* 82, notes; *Fish v. Chapman*, 2 *Ga.* 349 [46 *Am. Dec.* 393]; *Lane v. Ootten*, 12 *Mod.* 472; *Angell on Carriers*, 71-76.

The evidence that the defendants had been in former years engaged for the public generally in the transportation of cotton to Mobile on flat-boats would be proper for the consideration of the jury in determining the question whether they were common carriers; but it would not necessarily be conclusive. It might be that, notwithstanding they had previously acted as common carriers, they had abandoned the service of the public, and were simply engaged in the execution of special contracts. To constitute them common carriers, they must be engaged in the service of the public.

The wreck of the boat upon the log described in the evidence would not be a loss from the "act of God." Certainly it may have been in some sense by the act of God that the tree was thrown from its erect position and became fixed at the place where the boat struck it. But then, it was not the act of God which caused the boat to impinge upon that log. The act of God was at most but a remote agency in the production of the loss; while the human act of directing the boat against the log was the immediate and direct cause of the loss. This court said, nearly twenty-five years ago: "The acts of God, or the inevitable accidents which constitute a legal excuse, must be the immediate, not the remote, cause of the loss:" *Sprowl v. Kellar*, 4 Stew. & P. 382; *Jones v. Pitcher*, 3 Id. 135. By the principle thus enunciated by this court the writer of this opinion is willing to abide. To throw the *onus* of proving negligence upon the owner of the freight, in every case where loss might be occasioned by the striking of a hidden obstruction placed by the hand of nature, would emasculate the rule which governs the liability of common carriers, and practically abrogate the distinction between the act of God and dangers of the river. I am aware that in some of the American courts a disposition has been manifested to soften the stern rule of liability visited upon common carriers; but I find it sanctioned by the authority of the common law, long declared a necessity of commerce, and founded in sound and wise policy, and think it should be maintained in its integrity, without any yielding to the hardships of particular cases: *Coggs v. Bernard*, 1 Smith's Lead. Cas., Hare & Wallace's notes, 82; 1 Parsons on Cont. 634; Edwards on Bailments, 454; *McArthur v. Sears*, 21 Wend. 190; Angell on Carriers, sec. 154; *Gordon v. Buchanan*, 5 Yerg. 71-83; *Fish v. Chapman*, *supra*; 2 Kent's Com. 602, 603; Abbot on Shipping, 382; *Turney v. Wilson*, 7 Yerg. 340 [27 Am. Dec. 515].

We decline to overrule the decision of this court in *Esell v.*

Miller, 6 Port. 807. See the decision at this term in the case of *Hibler v. McCartney*, 31 Ala. 501, where a similar question is considered. It was therefore competent for the defendants to establish the custom which they claim to have existed. There was some proof conducing to show such custom; and even though it may have seemed to the court to have been totally insufficient or counterbalanced by other testimony, it should have been left to the jury. The jury should, however, in all such cases, be carefully instructed that to constitute a good custom, it is requisite that it should have been uniform, and so generally known and acquiesced in and so well established that the parties must be presumed to have contracted in reference to them: *Partridge v. Forsyth*, 29 Ala. 202; *Alabama etc. R. R. Co. v. Kidd*, Id. 228; *Price v. White*, 9 Id. 563; *Barlow v. Lambert*, 28 Id. 704.

What we have said settles the questions of law arising in the case, and will be sufficient to guide the court below in a future trial.

The judgment of the court below is reversed and the cause remanded.

STONE, J. In the case of *Ocoosa River Steamboat Co. v. Barclay*, in manuscript, I expressed my views on the proper construction of the phrase "act of God" as applicable to the liability of common carriers. Chief Justice Rice and myself did not concur on that question, and the result was, that that case was affirmed by a divided court; Judge Walker did not sit in that case.

In the present case Judge Walker and myself are alone competent to sit. He now expresses a concurrence with Chief Justice Rice on this question, and it follows that theirs is now the expressed opinion of the majority of the court.

Although I have not changed my opinion, I now feel it my duty to permit their opinion of the law to become the judgment in this cause.

RICE, C. J., not sitting. —

DISTINCTIVE CHARACTERISTIC OF COMMON CARRIER IS THAT HE TRANSPORTS GOODS FOR HIRE FOR PUBLIC GENERALLY: *Chevallier v. Strahan*, 47 Am. Dec. 639, and the note thereto discussing the subject at length; *Philleo v. Sanford*, 67 Id. 654; *Gordon v. Hutchinson*, 37 Id. 464, and the note collecting prior cases; but a common carrier may avoid liability as such by a special contract: *Kimball v. Rutland etc. R. R.*, 62 Id. 567; *Cooper v. Berry*, 68 Id. 468, and the notes collecting prior cases.

"ACT OF GOD" DEFINED: *New Brunswick Steamboat etc. Co. v. Tiers*, 64 Am. Dec. 394, and note thereto collecting prior cases. "Perils of the sea"

and "dangers of the river" defined: *Bentley v. Bustard*, 63 Id. 561; and see also the note to *Van Horn v. Taylor*, 41 Id. 281-290, discussing this subject at length.

GENERAL AND PARTICULAR USAGES AND CUSTOMS, TO BE GOOD, MUST BE OF LONG STANDING, uniform in operation, just and reasonable, and known to and acquiesced in by all those whose rights are affected thereby: *Hayward v. Middleton*, 15 Am. Dec. 615; *Allegre's Adm'r's v. Maryland Ins. Co.*, 20 Id. 424, and the note collecting prior cases; *Kendall v. Russell*, 30 Id. 696; *Administrators of Patton v. Magrath*, 31 Id. 552; *Leach v. Perkins*, 35 Id. 268, and cases cited in the note thereto; *Desha v. Holland*, 46 Id. 261; *Knowles v. Dow*, 55 Id. 163; and the parties must contract with reference to the usage; and if the contract is in writing, reference to the usage ought to appear by its terms: *Eager v. Atlas Ins. Co.*, 25 Id. 363, and the note thereto. As affecting the common-law liability of common carriers, see *Sampson v. Gassam*, 30 Id. 578; as to customs and usages, and their effect generally, see the note to *Governor v. Withers*, 50 Id. 97-105, where the subject is discussed at length; see also *Barlow v. Lambert*, 65 Id. 374; *Cox v. Peterson*, 68 Id. 145, and the notes thereto collecting other cases in this series.

EXISTENCE OF PARTICULAR CUSTOM OR USAGE IS QUESTION FOR JURY EXCLUSIVELY, where the evidence is conflicting, or where there is any evidence whatever of it: *Allegre's Adm'r's v. Maryland Ins. Co.*, 20 Am. Dec. 424; *Farnsworth v. Chase*, 51 Id. 206.

MILTON v. HADEN.

[32 ALABAMA, 30.]

RIGHT TO KEEP PUBLIC FERRY FOR TOLL has, under the Alabama statutes, since the year 1820, been a franchise which could not be exercised without license or legislative grant, and the unauthorized exercise of which has been prohibited under a penalty.

CONTRACT FOUNDED DIRECTLY ON ILLEGAL CONSIDERATION IS VOID, though the illegal act be prohibited under a penalty only.

USURPER OF FRANCHISE CANNOT CLAIM ALLEGIANCE FROM LESSEE which would be due from a tenant to his landlord, and therefore the lessee of a ferry, when sued on a note given for the rent, is not estopped from setting up want of title in his lessor to the franchise.

UNINTERRUPTED EXERCISE OF FERRY FRANCHISE FOR TWENTY YEARS raises presumption of license, and such presumption cannot be impaired by proof that there was no license or legislative grant of the franchise.

QUESTION OF VARIANCE BETWEEN NOTE DECLARED ON AND THAT OFFERED IN EVIDENCE may be raised in the appellate court, under an exception to a general charge in favor of the plaintiff's right to recover.

COMPLAINT IN ACTION BY HUSBAND AND WIFE ON PROMISSORY NOTE payable to wife as administratrix must describe plaintiffs as husband and wife at the time the note was given, or must show that they sue as administrator and administratrix, and that the note is assets in their hands; and if they are not so described as husband and wife, but appear to sue as individuals, and there is no allegation to whom the note is payable, a recovery by them will not be authorized.

ACTION on promissory note given for rent of ferry. The facts are stated in the opinion.

John T. Morgan and Jonathan Haralson for the appellant.

William M. Byrd, contra.

By Court, STONE, J. Under the "act to reduce into one the several acts concerning roads, bridges, ferries, and highways," passed December 21, 1820, as found in Toulmin's Dig. 391, power was given to the county courts "to establish ferries, and order them under such regulations as is hereinafter directed." Section 20, p. 398, declares "that if any person or persons shall establish a public ferry contrary to the provisions of this act, he or they shall forfeit and pay five hundred dollars, to be recovered by indictment or presentment by a grand jury," etc. On the twelfth of January, 1827, another act was passed, having the same title as that from which we have just quoted, and which retained *verbatim* the clauses above copied: See Aikin's Dig. 2d ed., pp. 358, 363, sec. 26, p. 364, sec. 30. On the second of February, 1839, the "act to extend the powers of the courts of roads and revenue in the several counties of the state" was passed. By that act, power to grant licenses for public ferries was conferred on the courts of roads and revenue; and it further declared that "if any person shall presume to establish a public ferry and receive toll for the use of the same without having obtained a license as prescribed by this act, such person is hereby rendered liable to indictment, and on being found guilty shall be fined any sum the jury trying the offense may assess:" Clay's Dig. 513, secs. 26, 27. By the Code, sec. 1200, it is declared that "if any person demands or receives toll for crossing any ferry, without a license therefor from the proper authority, he is guilty of a misdemeanor, and on conviction must be fined not less than twenty dollars." These extracts from our statutes show that from the year 1820 to the present time the right to keep a public ferry for toll has been a franchise, which could not be exercised without a license or legislative grant; and that the unauthorized exercise of such right has all the time been prohibited under a penalty.

There is no direct or express proof in this record that the ferry at Selma ever was established in either of the modes above pointed out, until after this suit was brought. The note which is the foundation of this action was executed for the lease of the ferry privilege for one year, and upon no other consideration.

Upon this feature of the case, we think the principle applies in its full force, that a contract founded on an act which the law prohibits under a penalty is void: *Stanley v. Nelson*, 28 Ala. 514, and other authorities on the brief of appellant's counsel.

It is contended for the appellee that, as Milton went into the possession of the ferry under the lease from Mrs. Tarver (now Mrs. Haden), and has never been disturbed in his possession, he should not be heard to question her title. We admit the general rule that a tenant is not permitted to dispute the title of his landlord. The principle, however, does not apply to this case. We have shown above that a public ferry is a franchise, and that from the year 1820 to the present time its exercise without license or legislative grant has all the time been prohibited under a penalty. To allow the principle to govern a case like the present would be to sacrifice a sound legislative policy to the presumed allegiance which a tenant owes his landlord.

In the case of *Satterlee v. Matthewson*, 13 Serg. & R. 133, this question arose as follows: Elizabeth Matthewson claimed title to land under what is there called a Connecticut title. The laws of Pennsylvania, in whose territory the lands were, declared those Connecticut titles invalid. Satterlee went into possession as tenant of Mrs. Matthewson, and subsequently acquired a title to the premises, which had been derived from Pennsylvania. Mrs. Matthewson brought ejectment against Satterlee for the land; and the question was, whether the latter could deny the title of the former. It was held that he could. The court, among other things, remarked that "a settler under Connecticut could not pretend to an implied contract with the commonwealth, because he set up a title in direct opposition to the commonwealth. . . . That landlords, claiming under Connecticut, had no right to expect from the courts of Pennsylvania the extension of a privilege by virtue of which their tenants, who had purchased under a Pennsylvania title, should be estopped from defending themselves by that title."

In the later case of *Miller v. McBair*, 14 Serg. & R. 382, Gibson, J., in delivering the opinion of the court, said: "A tenant may impeach his landlord's title whenever he can show that he was induced to accept of the lease by misrepresentation and fraud."

In the present case Mrs. Tarver, by leasing the ferry to Mr. Milton, impliedly, if not expressly, represented that she was the owner of the franchise; and it is impossible to resist the conclusion that Milton would not have accepted the lease if he had

known the title to be invalid: See *Lanier v. Hill*, 25 Ala. 554. We hold that one who usurps the right to keep a public ferry, in violation of our statutes, cannot claim the allegiance from his lessee which is due from a tenant to his landlord. There is, in this case, another clear ground on which to place our decision. One who usurps a franchise, and makes contracts based upon it, cannot enforce such contracts in the courts of the country: See *City Council of Montgomery v. Montgomery & W. Plank Road Co.*, 31 Id. 76, and authorities cited.

Another point made in the argument we feel it our duty to notice. Mrs. Haden, those under whom she claims title, and her lessee, had been in the uninterrupted possession of this ferry for near thirty years when the note sued on in this case was executed. It is claimed for the appellees that under these circumstances it is our duty to presume that this franchise had been regularly granted. The appellants invoke the maxim, *Nul-lum tempus occurrit reipublicæ*. The authorities on this question are not entirely in harmony. In 2 Bla. Com. 37, it is said that franchises, "being derived from the crown, must arise from the king's grant; or, in some cases, may be held by prescription." At page 266, note 10, 2 Wendall's Blackstone, the subject of prescription is again treated, and several authorities are cited. It is there said that "evidence of twenty years' user as of right, against the owner of the fee and those deriving under him, was held sufficient, if unexplained, to authorize a jury to presume such a grant, even against the crown; and positive proof of the non-existence of such right, at any time before the twenty years, did not of necessity form any objection to such presumption." The citations sustain the annotator: *Penwarden v. Ching*, 1 Moo. & M. 400; *Knight v. Halsey*, 2 Bos. & Pul. 208; *King v. Holm*, 11 East, 384. In *Trotter v. Harris*, 2 You. & Jer. 285, the simple question was the right to a ferry privilege. It was admitted that it was a franchise which must be by royal grant, or license from the crown. The court held that "from a user of thirty-five years the jury might presume that a ferry had a legal origin." See also *Gibson v. Clark*, 1 Jac. & W. 159, 162; *Stark v. McGowen*, 1 Nott & M. 387, 395; *Carroll v. Norwood*, 5 Har. & J. 155, 161; *Barcklay v. Howell*, 6 Pet. 498, 512, 513; *Harvie v. Cammack*, 6 Dana, 242, 244; *Duncan v. Beard*, 2 Nott & M. 400; *Van Dyck v. Van Beuren*, 1 Cai. 84; *McArthur v. Carrie's Adm'r*, 32 Ala. 75 [*post*, p. 529], and authorities cited. In this case, where the question of the right to the franchise is only collaterally presented, we hold that from the uninterrupted use

and occupation of the public ferry for twenty years the presumption may be drawn that it had a legal origin.

Under the charge which was given in this case, it becomes necessary to decide whether this presumption is one which must be at all times left to the discretion of the jury, or whether it can ever become an absolute or *prima facie* presumption. It is not necessary in this case to determine whether the presumption is absolute or *prima facie*. If it in fact be either, the legal effect, under the facts disclosed by this record, is the same. The single fact of uninterrupted use and enjoyment for near thirty years is proved on one side, and there is no proof which in the least contradicts or weakens this testimony. Proof, if such exist, that there was in fact no legislative grant or license will not impair the presumption. The proof which can be effectual to overturn the presumption must be addressed to the character of the use, enjoyment, or occupation; must tend to show that such use and enjoyment are not inconsistent with the right in another or in the government. Want of original authority to exercise the franchise cannot in the least tend to establish this proposition. We have, then, the familiar principle of a *prima facie* presumption without any countervailing proof. In such case, the presumption becomes conclusive.

In *McArthur v. Carrie's Adm'r*, *supra*, we considered the question of twenty years' uninterrupted adverse use and possession of personal property under claim of title. We there held that such possession vested in the holder a *prima facie* title, and that such *prima facie* title could not be overturned by proof that in its inception it was bad. That was a case not covered by any of our statutes of limitation, and rested alone on the presumption drawn from lapse of time. We think the same principle governs this case. There being, then, no evidence which could tend to overturn the *prima facie* case made by the plaintiffs, there was on this feature of the case nothing but the credibility of the testimony to be passed on by the jury. The charge of the circuit court presented that question in a form free from objection.

The only remaining question is that of the variance between the complaint and the note. I have felt inclined to doubt whether this question can be here considered as having been raised in the court below. On further reflection, we are unanimous in the opinion that the charge makes it necessary that we should pass upon it.

The doctrine is certainly clearly settled, that in pleading it is

always sufficient to describe a contract according to its legal effect; and that a promissory note made payable to one who is at the time a married woman is, in legal effect, payable either to the husband or to husband and wife, as they may elect to bring the suit in his name or in their joint names: See 1 Ch. Pl. 80; 1 Greenl. Ev., sec. 69; *Philliskirk v. Pluckwell*, 2 Mau. & Sel. 893; *Ankerstein v. Clark*, 4 T. R. 616; and other authorities on the brief of appellee. This suit, however, is not brought in the names of Mr. and Mrs. Haden as husband and wife, but as individuals. To justify a recovery by them, it is not only necessary to read the note in evidence, but they are required to go further, and prove an independent fact, to wit, that they sustain to each other, and did at the time the note was executed, the relation of husband and wife. There is no averment to let in this proof. This suit is brought in the individual right of the plaintiffs, and the complaint describes a note which is payable to the two by name. Under the complaint, without amendment, the note was not proper evidence; and hence we hold that the proof did not justify a recovery by plaintiffs, described as they were in the margin: *Huguenin v. Letondal*, 26 Ala. 552; *English v. George*, 30 Id. 582; *Agee v. Williams*, Id. 636; *Lewis v. Harris*, 31 Id. 689.

If the suit had been in the names of the two plaintiffs, describing them as husband and wife at the time the note was executed, or describing them as administrator and administratrix, and suing in that right, and if the complaint, on the last hypothesis, had contained an averment that the note sued on was assets in their hands as administrators of their intestate, there could then be no objection urged against the form of the suit.

For the single error above pointed out, the judgment is reversed and the cause remanded.

RIGHT TO KEEP PUBLIC FERRY IS FRANCHISE, the exercise of which is subject to regulation by the proper public authorities: *Sullivan v. Board of Supervisors*, 58 Miss. 801, citing the principal case.

CONTRACTS FOUNDED ON ILLEGAL CONSIDERATION ARE VOID, though the act on which they are founded be merely prohibited under statutory penalty: See *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 53 Am. Dec. 742, and notes 769, 770.

MCARTHUR v. CARRIE'S ADMINISTRATOR.

[32 ALABAMA, 75.]

COURT IS NOT REQUIRED TO BE ACTIVE IN ASSIGNING STRUCK JURY, and is not bound to grant one on demand of the parties, unless such demand be made before the organization of the jury is commenced.

COURT MAY REFUSE TO ENTERTAIN MOTION FOR SUPPRESSION OF ENTIRE DEPOSITION, where the motion is made after the trial has commenced, as the statute requires that such a motion must be made "before entering on the trial;" and this rule applies though the party's attorney states that, "in the hurry of preparation for trial, he had forgotten to make the motion," and offers to let the cause stand in the same position as though it had been made at the proper time.

SHERIFF MAY AMEND RETURN TO WRIT, BY LEAVE OF COURT, IN DETINUE, so as to make the return correspond to the facts; and such amended return relates back to the time when it ought to have been made.

IN ACTION BY ADMINISTRATOR DE BONIS NON, against one claiming under the purchaser at a sale by the prior administratrix, where the validity of such sale is in issue, the declarations of the administratrix, expressing her opinion that the sale was good, are not admissible evidence for the purchaser; nor is evidence admissible to prove that the administratrix applied the proceeds of the sale to the support and education of the intestate's children.

RECEIPT BY DISTRIBUTEES OF DECEDENT'S ESTATE OF PROCEEDS OF UNAUTHORIZED SALE by the administrator will not operate as a ratification of the sale, unless such distributees were of lawful age when they received the said proceeds, and knew the facts regarding such sale.

DECLARATIONS OF ADMINISTRATOR IN CHIEF THAT SALE OF INTESTATE'S PROPERTY, made by him, was private, and therefore void, are not competent evidence for the succeeding administrator, for the purpose of impeaching the sale and recovering the property from one claiming under the purchaser at such sale.

DETINUE WILL NOT LIE AGAINST ONE WHO HAS BEEN DISPOSSESSED of property by legal process, unless the legal custody of the property terminated before levy of the writ.

PRIMA FACIE PRESUMPTION OF TITLE AND OWNERSHIP is raised by proof of uninterrupted adverse possession of personal property for twenty years, and such presumption can only be overturned by proof that such possession was not inconsistent with plaintiff's right, or explaining or excusing such long acquiescence on some ground other than proof of original defect of title in the possessor.

DETINUE by the administrator *de bonis non* of Henry W. Carrie, deceased, to recover of defendant certain slaves held and claimed by him as his property under a sale thereof to his father, by Amelia Carrie, the widow, and at that time administratrix of decedent's estate. To the writ defendant pleaded not guilty. The parties then announced themselves as ready for trial. On being called on to accept or reject the jury, the

defendant replied by demanding a struck jury, which was refused. Defendant excepted. On the trial, while plaintiff was introducing his evidence, defendant stated to the court that, in the hurry of preparation for trial, he had forgotten to move to suppress the deposition of Lewis Daniels, and asked leave to make the motion, offering to let the cause stand before the court as though the motion had been made at the proper time. The request was denied, and defendant excepted. On the trial, the sheriff who had seized the property on the writ in this case was allowed, against defendant's objection, to amend his return to a former writ to correspond with the facts, so as to show that his seizure on such writ was discharged, by order of the parties, before the seizure under the present writ. The remaining facts are stated in the opinion.

Parsons and J. White, for the appellant.

William P. and T. G. Chilton, and James E. Belser, contra.

By Court, STONE, J. The code, sec. 2264, does not require the court to be active in assigning a struck jury in the cases for which that mode of trial is provided. It is only when one of the parties makes the necessary demand that the court is called upon to order the selection of a jury according to the provisions of the section we are considering. It follows from this that immediately after the parties have announced themselves ready for trial, and before any steps have been taken therein, the party desiring a struck jury must make the demand; and if he delay until the organization of the jury has been entered upon, the court is not bound to grant his request. Whether it would be error if the court should make such order after the proper time for making the demand had been permitted to elapse, we need not now inquire. The motion to suppress the deposition of the witness Daniels came too late. The court did right in overruling it: Code, sec. 2328.

There is no error in permitting the sheriff to amend his return so as to make it speak the truth. No rights, as the law recognizes that term, had vested in the defendant, which were disturbed by the amendment: *Hodges v. Laird*, 10 Ala. 678; *Casky v. Haviland*, 13 Id. 314; *Kemp v. Porter*, 6 Id. 172; *Watkins v. Gayle*, 4 Id. 153; *Thatcher v. Miller*, 13 Mass. 269; *McGehee v. McGehee*, 8 Ala. 86; *Woodward v. Harbin*, 4 Id. 534 [37 Am. Dec. 753].

Having shown that there was no error in allowing the amendment of the sheriff's return, such amended return, under all

our authorities, dates as of the time when it should have been made: See *Hodges v. Laird*, *supra*; *Woodward v. Harbin*, *supra*. There was no error in admitting the amended return in evidence.

There was no error in excluding the evidence that with the proceeds of the slave Mrs. Carrie "raised and educated her children; that is, by means of the stock of cattle" bought with that money. To allow this defense would be to legalize the void sale, by the use to which she applied the proceeds.

Neither was it permissible to prove that Mrs. Carrie had expressed the belief that "the sale was a good one," or that "she knew the sale was a good one, because she had received the advice of her attorney, Mr. Hall." The validity of the sale depended on the facts attending it, not on her opinion.

That portion of the evidence of the witness Roan which states that "she [Amelia Carrie] afterwards divided the cattle [bought with the proceeds of the slave] among her children, which they received as coming to them from their father's estate," presents a question of more difficulty. Evidently the testimony as offered was wholly insufficient as a defense to this action. Their receipt of the cattle, which it is alleged were bought with the money received for the slave, could not operate as a ratification of the sale of said slave, unless they, the children, at the time they received the cattle, were of lawful age, and knew with what funds the cattle had been bought. Whether this defense will avail if they had such knowledge, we do not now determine: See *Story on Agency*, secs. 244-253; *Butler v. O'Brien*, 5 Ala. 316; *Elliott v. Branch Bank of Mobile*, 20 Id. 345.

That portion of the evidence of the witness Daniels which assumed to repeat a declaration made by Mrs. Carrie, to the effect that the slave Fanny had been sold at private sale, should have been excluded. She is not a party to this suit; was not in possession of the property when she made the declaration; and it was not made in connection with any act which it could explain. We suppose this decision was made on the authority of *Gantt v. Phillips*, 23 Ala. 295. In that case the declarations were proved against the administrator *de bonis non* to defeat the claim he set up. They consisted chiefly of statements made by the executrix, Mrs. Gantt, while she had control of the estate. In this case the declarations are offered by the administrator *de bonis non* to defeat the title executed by the administratrix in chief, and to show continuing property in the estate. The difference consists in the well-defined distinction between proving admissions against and for the party making them.

The charge of the court presents the only remaining questions which we propose to consider. The charge must be construed in connection with the evidence, all of which is set out in the bill of exceptions. The plaintiff read in evidence a statute of Mississippi prohibiting private sales by executors and administrators, and which agrees in substance with our own. The proof is in conflict whether the sale of the slave Fanny by Mrs. Carrie was public or private; but the jury, we suppose, found it was private. The proof conduces to show that the sale and change of possession took place more than twenty years before the present suit was brought. The proof also shows that when the suit was instituted the slaves in controversy were in the jail of Tallapoosa county, having been lodged there by the sheriff under a former seizure, in a suit by Mrs. Carrie against the defendant in this suit. The proof shows that before the seizure in this case the sheriff was instructed by the plaintiff's attorney—the same attorney having instituted both suits—to discharge the levy made under Mrs. Carrie's writ. The amended return shows that in legal effect this was then done.

The circuit court did not err in construing the Mississippi statute in relation to private sales by administrators. In that state, as in this, such sales are void.

It is here contended that at the time this suit was commenced the defendant had not such possession of the slaves as would justify the maintenance of this action.

In the case of *Walker v. Fenner*, 20 Ala. 192, 198, which was an action of detinue, this court said that, after carefully looking into the authorities, it might "be safely asserted, as the rule deducible from them, that to entitle the plaintiffs to recover they must show that the defendant, either at the time of demand made, or in the event there was no demand at the time the writ was sued out, had the actual possession or the controlling power over the property; unless, having the possession anterior to such demand or suit, he has wrongfully, or to elude the plaintiff's action, parted with it; or unless he holds it under a contract of bailment, the terms of which he violates by failing to redeliver it." To the same effect are *Fenner v. Kirkman*, 26 Id. 650–655; *Harris v. Hillman*, Id. 380.

At the time this suit was commenced the defendant had not the actual possession of the property, neither had he, so far as this testimony informs us, parted with the possession by any act or volition of his own. He had been dispossessed by legal process. So long as the property was held under that process, the

sheriff had a special property in it, and the defendant did not have the "controlling power" over it. The primary court in this case instructed the jury, in effect, that if they believed the testimony of the witness Lockett as to the custody of the slaves when this suit was brought, then the defendant had such possession as would justify this action. In this the circuit court passed on the sufficiency of the evidence, leaving its credibility to be passed on by the jury. Was this correct, under the facts of this case?

We think it clear that if the sheriff, under instructions from plaintiff or her attorney, discharged the first levy before the second writ was sued out, this placed the slaves under the legal control of the defendant, and on this point justified the institution of the second suit. After such discharge of the levy, the sheriff's possession ceased to be in his official character, and he held the slaves as the naked bailee of the defendant. In other words, his possession was that of defendant, and became wrongful when he failed to deliver the slaves on demand. The defendant had the immediate right of possession: See *Walker v. Fenner*, 20 Ala. 192, 198.

Let us apply these principles to the question we are considering. The testimony of Lockett, the only witness who speaks to this point, fails to show that the instructions to discharge the first levy preceded the suing out of the second writ. In the brief statement of these facts, the idea is rather conveyed that at one and the same time the direction was given to discharge the first levy and to make the second. If this be so, it is somewhat repugnant to the idea that the instructions to discharge were given before the second writ was issued. In this state of the proof, the court should have left it to the jury to say whether the one or the other preceded. If the second writ was issued before the order was given to discharge the levy, then the defendant had not, "at the time the writ was sued out," such controlling power over the slaves as would sustain this branch of the action.

Another portion of the charge instructed the jury to find for the plaintiff if they found certain hypothetical facts to be true, "even should they believe from the evidence that defendant, and his father, under whom he claimed, held possession of the slave Fanny in Hancock county, Mississippi, for twenty years, claiming them openly as their own property."

In this, as in most of the states of this Union, there is a growing disposition to fix a period beyond which human trans-

actions shall not be open to judicial investigation, even in cases for which no statutory limitation has been provided. This period is sometimes longer, and sometimes shorter, dependent on the nature of the property and the character of the transaction. By common consent, twenty years have been agreed on as a time at the end of which many of the most solemn transactions will be presumed to be settled and closed: See 2 Story's Eq. Jur., 1028 b. The nature of this presumption, and the manner of drawing it, are not in the mother country and in the several states the same. See, on this subject, Phill. Ev., Cowen & Hill's notes, Van Cott's ed., part 1, pp. 536, 456, 457, 464, 485-500, 504, 505; 5 Id. 267; *Sims v. Aughtery*, 4 Strobb. Eq. 103.

The precise question we are considering does not appear to have been before considered in this court. Kindred questions have been under review. In *Rhodes v. Turner*, 21 Ala. 210, an effort was made to bring an administrator to a settlement after a great lapse of time. Chilton, J., employed the following very pointed language: "If a final judgment had been rendered, according to the principles of the common law, it would be presumed to have been paid after the expiration of twenty years; and if the parties allow this period to elapse without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlements."

In *Barnett v. Tarrence*, 23 Ala. 463, a settlement had been attempted; but it was so defective, that, under our decisions, it could not be regarded as a final settlement. More than twenty years afterwards the administrator was cited to a final settlement, and he was sought to be charged with assets for which he had never accounted. This court, after deciding that it would presume, after so great a lapse of time, in favor of the correctness of that settlement, that the necessary notices were given, and that the parties in interest were present, proceeded to remark that "a decree rendered under such circumstances, is binding on the parties to it until it is reversed in the proper court. . . . The executors cannot now be called upon, in the probate court, to go into a settlement again, when all parties have reposed on that already made, for so long a period that it is fair to presume that much of the proof which was then obtainable could not be commanded." In further considering this presumption, the court added: "We have carefully examined

the ground on which the rule here suggested is founded, and are thoroughly convinced its adoption is essential to the safety and repose of executors, administrators, and guardians, and to the advancement of the ends of common justice. It is strictly analogous to the rule at common law in relation to judgments, and more liberal than the rule in equity with respect to stale claims."

The case of *Gantt v. Phillips*, 23 Ala. 275, was a suit by an administrator *de bonis non* to recover a slave, the title to which, it was alleged, had never passed out of the estate. The defendant, and those under whom he claimed, had been in the adverse possession of the property for more than twenty years. The record of the orphans' court did not show that the person named as executrix of the will had ever qualified. If she had not qualified, then there could have been no assent to the legacy—the slave was still a part of the estate of the testator, and the plaintiff was entitled to recover. The circuit court charged the jury that the record of her appointment as executrix would be the highest and best evidence of the fact; but if the proof showed to their satisfaction that the appointment and qualification of said Elizabeth Gantt as executrix had been duly made, and that in the lapse of time the papers and record of the appointment had been lost or destroyed, then the jury might presume her appointment and qualification. The latter part of this charge was assigned as error. This court, after collating and commenting on many decisions of other courts, said: "Under the circumstances, we consider the court left the question to the jury quite as favorably as the plaintiff was authorized to demand." The judgment was affirmed.

In *Harvey v. Thorpe*, 28 Ala. 250 [65 Am. Dec. 344], a similar decision was made: *Lay v. Lawson*, 23 Id. 377.

It will be observed that in the case cited from our own reports, of *Barnett v. Tarrence*, 23 Ala. 463, the presumption drawn by the court in favor of the regularity and validity of the decree was conclusive, not a mere *prima facie* intendment, liable to be overturned by proof. To the same effect is the principle announced in *Rhodes v. Turner*, 21 Id. 210. These were proceedings against administrators for wasting, misapplying, and not accounting for assets of the estates they represented. Under the authority of those cases, if an administrator has converted to his own use or privately sold the property of the estate, and has not been proceeded against for the conversion until the expiration of twenty years after the time when he should have

settled the estate, he is forever discharged, on a mere presumption of law. Suppose after that time an administrator *de bonis non* should be appointed, and should sue the purchaser for property which the administrator in chief had sold to him privately, or without an order. The law would presume, in favor of the faithless administrator in chief, that he had accounted and settled for the property, although the record might show nothing on the subject. If the purchaser, under these circumstances, should be held accountable for this identical property, would not the law present a strange anomaly? Applying these principles to the case at bar, Mrs. Carrie, in 1853, when this suit was brought, could not, under our decisions, be made to account for the conversion or *devastavit* of these slaves. Can McArthur be made to account for them?

In the cases of *Gantt v. Phillips*, 23 Ala. 275, and *Harvey v. Thorpe*, 28 Id. 250 [65 Am. Dec. 344], the question whether the presumption was conclusive or not was not presented by the record, and was not discussed. We do not regard them as authorities against the principles announced in *Rhodes v. Turner*, 21 Id. 210, and *Barnett v. Tarrence*, 23 Id. 463.

There is an able discussion of this question in the case of *Sims v. Aughtery*, 4 Strobb. Eq. 103. That case, in its legal bearings, was strikingly like the present. The circuit decree was pronounced by Chancellor Dunkin, who, quoting from a former decision, used the language that "the lapse of twenty years is sufficient to raise the presumption of almost anything that is necessary to quiet the title of property. If there had been no will and no administration, administration would nevertheless be presumed, and that defendants had acquired a title from the administrator. . . . After a possession of twenty-five years, the court will presume a sale by the executor for the purpose of paying the debts, and administration *de bonis non* after Lyle's death, and a sale by such administrator, or almost anything else, in order to quiet the long possession."

In the court of appeals the opinion was delivered by Chancellor Dargan; the profession is referred to it as an elaborate vindication of this doctrine. After copying the language of Chancellor Dunkin last above quoted, he adds: "This is strong language, but not stronger than is warranted by the authorities or demanded by a stern and imperative public policy. In regard to property not the product of manual labor, there is, perhaps, no title extant in any part of the world that could withstand the searching scrutiny of justice, and which, if traced to

its origin, would not be found to be based upon fraud, rapine, spoliation, or conquest."

After adverting to the statutes of limitation as one means of giving repose to stale subjects of litigation, he proceeds to remark: "We have another system of rules, founded upon what is called the doctrine of legal presumptions, which prevail alike in courts of law and equity, and which are eminently subservient to the quieting of titles, and the prevention of litigation arising upon obscure and antiquated transactions. If these legal presumptions require a longer period than statutory bars to acquire force and effect, they are more general in their operation. They are highly conducive to the peace of society and the happiness of families, and relieve courts from the necessity of adjudicating rights so obscured by time and the accidents of life that the attainment of truth and justice is next to impossible. . . . These legal presumptions, by which conflicting claims and titles are set at rest, I have endeavored to show are natural and necessary. They spring spontaneously out of the institution and relations of property. As to the precise time at which they arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina, as in England, by the lapse of twenty years without admissions, specialties and judgments are presumed to be satisfied and trusts discharged. Twenty years' continued possession will raise the presumption of a grant from the state, of deeds, wills, administrations, sales, partitions, decrees, and (the chancellor has said) of almost anything that may be necessary to the quieting a title which no one has disturbed during all that period." See also the case of *Williamson v. Williamson*, 1 Johns. Ch. 488, 492, 493.

In examining the numerous authorities on this question, to be found in the reported cases of trials at law, the profession will frequently encounter the declaration that from this lapse of time the jury are authorized to draw the presumption which we have been considering. By this we understand that the question is at all times one for the jury; a presumption they may draw, but that there are no rules which govern them in such cases. Such was the instruction of the circuit court in the case of *Gantt v. Phillips*, 23 Ala. 275, and in the case of *Harvey v. Thorpe*, 23 Id. 250 [65 Am. Dec. 344]. Now, with all due deference, we confess ourselves unable to perceive any solid reason on which to rest such a principle. We think it is at war with the analogies of the law and with the theory of jury trials. Juries are organized

to pronounce on the credibility of witnesses; to determine disputed facts; to draw conclusions from doubtful and contradictory premises; and to admeasure damages where the law has afforded no standard. We do not say these are the only functions of a jury, but they are the controlling ones. Whenever the facts of a case are clear and uncontroverted, the rights of parties are, or should be, fixed and uniform. When there remains no fact to be found or conclusion to be drawn from contested and indeterminate premises, there is no use for a jury, for the law determines the rights of the parties. This principle is absolutely necessary as the basis of a uniform system of jurisprudence. So in cases where a jury trial is necessary, every proposition which stands forth clear and undisputed, and which rests on no inference to be drawn from disputable or controverted premises, is, or ought to be, a question of law. On this principle rest all our presumptions of law.

It is not our purpose to deny to the jury the right and duty of determining whether in fact the twenty years have elapsed. That fact being found, however, and there being no countervailing proof, what reason can exist for leaving it to the discretion, possibly caprice, of that body whether they will draw the desired conclusion? There is one naked fact, to wit, acquiescence for twenty years. There can be no reason for indulging the presumption in one case which does not exist in all others. Chancellors invariably draw the presumption from this one fact, and we think a rule equally uniform should prevail in courts of law. To lay down a different rule will be to invite a contest and jury trial in every case thus circumstanced. The circumstances of each case will be appealed to by opposing counsel, in the hope that they severally may impress the jury with the belief that it is their duty in the particular case to indulge or withhold the presumption as the one or the other result will promote their several interests. We are unwilling to declare a rule, the result of which may be to tempt juries from their propriety, to multiply litigation, and to increase the uncertainty which must always attend the administration of the law.

We do not wish to be understood as saying that this presumption is always conclusive. In the first instance, perhaps, it never is so. In cases like the present, however, we hold that a *prima facie* presumption is raised whenever there is satisfactory proof of twenty years' uninterrupted adverse enjoyment and possession. Speaking of this presumption, Mr. Starkie says: "It gives to the evidence a technical efficacy beyond its simple

force and operation:" 3 Stark. Ev., ed. 1826, 1214. On page 1224 he says this is not a direct and immediate inference to be made by the courts (of law), yet "the court will, under certain circumstances, direct a jury to presume an outstanding term to have been surrendered by the trustee." To the same effect is *Van Dyck v. Van Beuren*, 1 Cai. 84. See, on this subject, Phill. Ev., Cowen & Hill's notes, Van Cott's ed., pt. 1, pp. 485 et seq.; 2 Wend. Bla. Com. 266, note 10; Best on Presumptions, 144; *Smithpeter v. Ison*, 4 Rich. L. 203 [53 Am. Dec. 732]; 3 Bac. Abr., Bouv. ed., 621; *Jackson v. McCall*, 10 Johns. 377 [6 Am. Dec. 343]; 1 Greenl. Ev., sec. 46; *Warren v. Webb*, 2 Stra. 1129; *Rex v. Carpenter*, 2 Show. 47; *Trotter v. Harris*, 2 You. & Jer. 285; *Beall v. Lynn*, 6 Har. & J. 336, 353, 361; *Pelham v. Pinkingill*, 1 T. R. 381; *Doe v. Ireland*, 11 East, 280, 284; *Goodtill v. Baldwin*, Id. 288; *Penwarden v. Ching*, 1 Moo. & M. 400; *Rex v. Long Buckley*, 7 East, 45; *Mayor of Kingston v. Horner*, Cowp. 102, 110; *Stodder v. Powell*, 1 Stew. 287; 1 Greenl. Cruise, 415, 416; *Bustard v. Gates*, 4 Dana, 429; *McPherson v. Cunliff*, 11 Serg. & R. 422, 432 [14 Am. Dec. 642].

This *prima facie* case may, of course, be overturned. It cannot be done by proving that the title was, in its inception, defective. Proof, to be effectual for this purpose, must be addressed to the character of the plaintiff's possession, either in its acquisition or use; must tend to show that such possession is not inconsistent with the plaintiff's right; or some other excuse, independent of original defect of title, must be given for the seeming long acquiescence. We cannot now be more definite.

The record before us contains no excuse for the delay; and in such case the *prima facie* presumption becomes conclusive. It results from this that the charge of the circuit court was erroneous.

We confine this rule for the present to property situated substantially as this is, and do not design to pronounce upon the effect of all possessions that are acquiesced in for twenty years.

We think the facts of this case are eminently illustrative of the propriety of indulging the presumption that these proceedings were regular. The sale took place twenty-two or twenty-three years before this suit was instituted. During all that time, save perhaps a few months, the property remained in the neighborhood in which it was sold, in the independent and undisputed possession of the elder and younger McArthur. The court-house, and all the records pertaining to Mrs. Carrie's ad-

ministration, have been destroyed by fire, and the few living witnesses who are left to testify of this transaction give versions of it that are wholly different and irreconcilable. One class swears that the sale was private, for they conducted the negotiation; another, that it was public, for they witnessed it. The various persons who have held office in the probate court in which these proceedings were or should have been of record differ as radically and essentially in their recollection of what those records did disclose. This discrepancy and conflict should not induce us to pronounce a severe judgment on the motives of the witnesses. All who have lived long enough, and who, after the lapse of a quarter of a century, have attempted to call up from "memory's waste" the details of any transaction of only ordinary interest, will deal charitably with such discrepancies.

This transaction originated in the state of Mississippi. The possession by the defendant and his father, under whom he claims, has been mainly held in that state. Whether or not a different rule prevails there, and if different, whether that rule will be enforced by our courts, are questions not presented by this record, and we do not now decide them: See *Stevenson v. McReary*, 12 Smed. & M. 9, 44 [51 Am. Dec. 102]; *Walker v. Forbes*, 31 Ala. 9.

Judgment of the circuit court reversed and cause remanded.

RICE, C. J., not sitting. —

RECEIPT BY DISTRIBUTEES OF ESTATE OF PROCEEDS OF ADMINISTRATOR'S SALE is not necessarily a ratification of the sale: See *Valle v. Fleming*, 61 Am. Dec. 566.

RETURN OF PROCESS, AMENDMENT OF: See *Fairfield v. Paine*, 41 Am. Dec. 357, and cases in note 363.

ADVERSE POSSESSION UNINTERRUPTEDLY FOR TWENTY YEARS RAISES PRESUMPTION OF OWNERSHIP AND TITLE: See *Stump v. Henry*, 61 Am. Dec. 300, and notes; *McCoy v. Morrow*, 68 Id. 578. The principal case is cited to this point in *Barksdale v. Garrett*, 64 Ala. 281; *Goodman v. Winter*, Id. 430; *Baker v. Prewitt*, Id. 555.

SIMS v. BOYNTON.

[32 ALABAMA, 353.]

JUDGMENT MAY BE AMENDED NUNC PRO TUNC at a subsequent term, so as to show that a nonsuit was set aside on payment of costs, where the trial docket shows an entry in the handwriting of the presiding judge that "plaintiff takes a nonsuit, which is set aside on payment of costs."

ADMINISTRATOR IS NOT OBLIGED TO SUE IN HIS REPRESENTATIVE CAPACITY for the recovery of personal chattels of his intestate which he has

had in his possession as such administrator; he may sue for and recover them in his individual capacity, on proof of his intestate's title, and his own possession as administrator.

CONSTRUCTION OF ORDER GRANTING LETTERS OF ADMINISTRATION is question for the court, and it is the duty of the court to instruct the jury regarding its validity.

CHARGE WHICH MAKES VALIDITY OF LETTERS OF ADMINISTRATION depend on sufficiency of parol evidence, when they appear valid from their face, is not error of which defendant can complain, being merely error without injury.

VALID GRANT OF LETTERS OF ADMINISTRATION BY DOMESTIC TRIBUNAL OF EXCLUSIVE JURISDICTION is *prima facie* evidence of the death of the intestate, and that he died intestate.

ADMISSION OF SUPERFLUOUS OR REDUNDANT EVIDENCE, plaintiff's case being conclusively established without it, is not error of which defendant can complain, being merely error without injury.

IN DETINUE, WHERE PLAINTIFF HAS SHOWN PRIOR POSSESSION, and made out a *prima facie* case, the defendant cannot defeat a recovery by showing merely an outstanding title in another with which he has no connection.

BAILOR MAY MAINTAIN DETINUE FOR PROPERTY HIRED, without waiting for the termination of the bailment, where such property has been taken from the bailee during the term by a third person, and he declines to sue for the recovery thereof, and notifies the bailor to sue.

DETINUE to recover certain slaves. Before entering on the trial, plaintiff moved to amend the judgment of nonsuit rendered at the last term, *nunc pro tunc*, the entry in the trial docket in the handwriting of the presiding judge being that "plaintiff takes a nonsuit, which is set aside on payment of costs." The costs appearing to have been paid, the motion was granted. Defendant excepted. The further facts are stated in the opinion.

D. W. Baine and George W. Gayle, for the appellant.

Byrd and Morgan, contra.

By Court, RICE, C. J. The proof made at the spring term, 1857, authorized the amendment of the judgment entry made at the fall term, 1856, in relation to the taking and setting aside the nonsuit. There was no error in allowing that amendment, and in placing the case on the docket for trial: *Reese v. Billing*, 9 Ala. 263; *Edwards v. Lewis*, 18 Id. 494; *Chighizola v. Doe ex dem. Eslava*, 24 Id. 237.

From the complaint, it does not appear that the plaintiff, Boynton, sues here as the administrator of James A. McEwen, deceased. But it is settled that an administrator who as such has had possession of personal chattels of his intestate is not obliged to sue in his representative capacity for their recovery,

and that he may sue for and recover them in his individual capacity: *George v. English*, 30 Ala. 582. Although the complaint does not on its face show that Boynton claims a recovery here as administrator of McEwen, yet as he might recover under it upon his title and possession as such administrator, he had the right to prove that it was in his representative capacity that he here claimed a recovery. The return of the appraisers, as offered in evidence by him, tended to show that he claimed a recovery in that capacity, and was admissible for that purpose: *Calvert v. Morrow*, 18 Id. 67. No plea of *ne unques* administrator appears in the record. But if such plea did appear, the evidence shows it to be untrue; and that William M. Lapaley was the administrator in chief, and the plaintiff, Boynton, the administrator *de bonis non*, of McEwen. The defendant could not be entitled to a verdict on a plea which was thus disproved; and there was therefore no error in refusing the eighteenth charge asked by the defendant.

The construction of the order appointing Boynton administrator of the estate of McEwen was a matter for the determination of the court: *Wyatt v. Steele*, 26 Ala. 639. There was no evidence tending to show a want of jurisdiction in the probate court of Dallas county to make that order. It was therefore the duty of the circuit judge who presided at the trial of this cause to have told the jury that the order was valid, and made by a court having jurisdiction to make it. In not telling them so, the circuit court erred. But the error was in favor of the defendant, who here complains of it. By committing that error, and making the validity of the order dependent on parol proof, the circuit court gave to the defendant an additional chance for a verdict, to which he was not legally entitled. He certainly is not entitled to a reversal for an error which clearly did not injure him, but actually gave him one more chance for success than the law allowed: *Eslava v. Elliott*, 5 Ala. 264 [39 Am. Dec. 326]; *Miller v. Jones*, 26 Id. 247; *Alford v. Samuels*, 8 Id. 95; Code, secs. 670, 672, 673, 675.

As it was the duty of the court to have pronounced the order valid, it was not erroneous to charge that, in the absence of evidence to the contrary, the law presumed that the decedent died intestate. A valid grant of letters of administration by the domestic tribunal of exclusive jurisdiction is *prima facie* evidence of the death of the alleged intestate, and of the right of representing him: *Brickhouse v. Brickhouse*, 11 Ired. L. 404; *Peterkin v. Inloes*, 4 Md. 175.

The letters of administration may have been unnecessary or redundant evidence. But the refusal to exclude such evidence, when, as here, the refusal could not injure the party objecting, furnishes no ground of reversal: *Eslava v. Elliott*, 5 Ala. 264 [39 Am. Dec. 326]; *Kyle v. Mays*, 22 Id. 692; *Garrett v. Garrett*, 27 Id. 687.

When a plaintiff in detinue has shown a prior possession, and made out a *prima facie* case, the defendant cannot defeat a recovery by showing merely an outstanding title in another with which he has no connection: *Dorier v. Joyce*, 8 Port. 303; *Traylor v. Marshal*, 11 Ala. 458; *Lowremore v. Berry*, 19 Id. 130 [54 Am. Dec. 188]; *McGuire v. Shelby*, 20 Id. 456; *Harker v. Dement*, 9 Gill, 7 [53 Am. Dec. 670].

After evidence had been adduced tending to show that the plaintiff, as administrator of McEwen, was in possession of the slaves in controversy; and that after such possession, and before this suit was commenced, he had hired them to Dr. Howell, in the summer of 1855, for the balance of that year, and had placed them in his possession; and that while they were thus in his possession, and before the commencement of this suit, the defendant took possession of them without the consent of the plaintiff or Dr. Howell, and kept them until after this suit was brought—it was proper to allow the plaintiff to prove by Dr. Howell that “when the slaves were taken away from him he went to plaintiff and told him he would not sue for them, nor pay hire if they were not returned to him, and requested plaintiff to sue for them.” That evidence certainly tended to prove that the defendant had no connection with the title outstanding in Dr. Howell for the unexpired term of hire, if that title should be considered as an outstanding one; and it also tended to bring the case within the influence of the following principle, to wit, that where slaves, during a bailment, are taken and converted by a third person, and the bailee thereupon refuses to proceed for the tort, and gives notice thereof to the bailor, and requests him to sue for them, and thereupon the bailor brings detinue against the tort-feasor, the latter cannot defeat the action by showing merely that the bailment was unexpired at the commencement of the suit: Addison on Cont., ed. 1857, 416, 417. Such conduct on the part of the bailee restores the right of possession to the bailor, and forfeits or surrenders his own accruing rights under the contract: *Grant v. King*, 14 Vt. 367; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Sanborn v. Colman*, 6 N. H. 14 [23 Am. Dec. 703]; *Hall v. Goodson*, 32 Ala. 277.

If the final judgment is not in the proper form, it is fully as favorable to the defendant as it should have been. It does not deprive him of any legal right, and he has no ground for complaining of it.

What we have above said disposes of all the matters relied on for reversal, and requires us to affirm the judgment.

Judgment affirmed.

ADMINISTRATORS, ACTIONS BY, IN OWN NAME FOR PERSONAL CHATTELS OF INTESTATE, whether proper: See *Green v. Kornegay*, 67 Am. Dec. 261.

VALID GRANT OF ADMINISTRATION IS EVIDENCE OF REPRESENTATIVE CHARACTER OF ADMINISTRATOR, and of death of intestate: See *Remick v. Butterfield*, 64 Am. Dec. 316, and note 323.

ERRONEOUS INSTRUCTIONS, IF FAVORABLE TO APPELLANT, are no ground for reversal: *Saltonstall v. Riley*, 65 Am. Dec. 334, note 341; *Wintz v. Morrison*, 67 Id. 658.

ERRONEOUS ADMISSION OR REJECTION OF EVIDENCE, WHERE RESULT would have been the same had the ruling been otherwise, is not ground for reversal: *Heyneman v. Dannenberg*, 65 Am. Dec. 519; *Sheldon v. Life Ins. Co.*, Id. 565; *Rockhill v. Spraggs*, 68 Id. 607, and notes.

DEFENDANT IN DETINUE, RIGHT OF, TO SHOW TITLE IN THIRD PARTY: See *McCurry v. Hooper*, 46 Am. Dec. 280.

RAMBO v. WYATT'S ADMINISTRATOR.

[32 ALABAMA, 363.]

VALIDITY OF GRANT OF ADMINISTRATION DE BONIS NON depends on the vacancy of the office of administrator at the time of appointment, by the death, resignation, or removal of the preceding administrator.

MARRIED WOMAN MAY RESIGN OFFICE OF ADMINISTRATRIX, under letters of administration granted to her while sole, without the concurrence of her husband; and her resignation terminates her husband's administration.

VERDIOT IN DETINUE IS SUBSTANTIALLY CORRECT AND IN PROPER FORM where in the following words: "We find all the issues for the plaintiff, and that the slaves named in the proceedings [naming them] are the property of the plaintiff, and that the said slaves are in value worth as follows [naming the values, etc.]; and as the plaintiff releases all damages for hire, we assess the value of said slaves, to wit, three thousand four hundred and fifty dollars, as damages for the plaintiff, to be discharged upon the delivery of said slaves by the defendant to him."

JUDGMENT IN DETINUE ON VERDIOT FOR PLAINTIFF, "that he recover of said defendant the said slaves [naming them], and on the failure of said defendant to deliver said slaves to said plaintiff when said plaintiff demands them, then that the said plaintiff have and recover of the said defendant the sum of three thousand four hundred and fifty dollars, his damages so assessed by the jury," is not proper in form, but the error, being merely clerical, will be corrected on error and affirmed.

DEEDUE by Thomas M. Williams, claiming as administrator *de bonis non* of the estate of Peter Wyatt, deceased, to recover certain slaves. The further facts appear in the opinion, except that the verdict below was in the following words: "We find all the issues for the plaintiff, and that the slaves named in the proceedings [naming them] are the property of the plaintiff, and that the said slaves are in value worth as follows [naming the values, etc.]; and as the plaintiff releases all damages for hire, we assess the value of said slaves, to wit, three thousand four hundred and fifty dollars, as damages for the plaintiff, to be discharged upon the delivery of said slaves by the defendant to him;" and the judgment rendered thereon as follows: "It is therefore considered by the court that the plaintiff recover of said defendant the said slaves [naming them]; and on the failure of said defendant to deliver said slaves to said plaintiff when said plaintiff demands them, then that the said plaintiff have and recover of the said defendant the sum of three thousand four hundred and fifty dollars, his damages so assessed by the jury." The verdict and judgment were assigned as error.

Baine and NeSmith, for the appellant.

Thomas Williams, contra.

By Court, WALKER, J. The question of this appeal is, whether the administration *de bonis non* of the appellee, who was the plaintiff below, is valid. The solution of this question turns upon the point whether the administration was vacant at the time of the appointment: *Matthews v. Douthitt*, 27 Ala. 273. Of the two representatives first appointed, one was dead, and the other, being the widow of the deceased, had married, and with her husband removed from the state. There had never been any settlement of the estate; and the *feme covert* administratrix, in writing, subscribed by her, but not by her husband, resigned the administration. The subsisting administration was, upon these facts, without notice, revoked; and the plaintiff was thereupon appointed administrator *de bonis non*. This action of the court having occurred before the adoption of the code, its validity must be tried by the pre-existing law.

The death of the administrator terminated his office. The remaining representatives were a *feme covert* administratrix and her husband, who intermarried with her after the commencement of the administration. Excluding from our view the other questions which have been argued, we proceed to consider whether the written resignation, delivered into the proper office,

of the *feme covert* administratrix alone, not participated in by her husband, terminates the administration of herself and husband.

By a statute adopted in 1821, Clay's Dig. 222, sec. 9, it is enacted: "That any executor, executrix, administrator, or administratrix, may, by writing, by him or her subscribed, and delivered into the clerk's office, resign his or her authority; but in such cases, he, she, or they, and his, her, or their securities, shall be bound for all the assets or effects which shall not have been duly administered or applied, or shall not be delivered to their successors respectively." This statute clearly gives to every administrator or administratrix the power to divest him or herself of the trust. It does not admit of an exception from its provisions of any one holding the office by appointment of the court. If a *feme*, who marries after her qualification, can, during the coverture, be correctly denominated administratrix, she has the power of resignation conferred by the statute, and existing by virtue of it.

An administratrix, after her marriage, is incapable of doing any act of administration which might be to the prejudice of her husband, without his concurrence: 2 Williams on Executors, c. 4, pp. 825, 826; Wentworth on Executors, 380; *Wankford v. Wankford*, 1 Salk. 299, 306; *Adair v. Shaw*, 1 Sch. & Lef. 266; *Kavanaugh v. Thompson*, 16 Ala. 817; *Pistole v. Street*, 5 Port. 64. This incapacity of the wife and the capacity of the husband to discharge all the offices of the administration result from the liability of the husband for the acts of the wife. It does not result from the cessation of the wife's character as administratrix. The general remark in *Kavanaugh v. Thompson*, *supra*, that the husband "takes upon himself all the duties and is entitled to all the privileges which belonged to the administratrix before the marriage," does not convey the idea that by the coverture the wife has ceased to be administratrix, or that the trust is suspended as to her during the coverture. Some incapacity is imposed upon her while she is *sub potestate viri*, but she still remains administratrix. She is a necessary party in all suits for and against the administration. She is liable after the termination of the coverture, for the *devastavit* committed by her husband during the coverture; and after the termination of the coverture, she has the same power and authority which she had before its commencement: 2 Williams on Executors, 828, 1564; *Adair v. Shaw*, *supra*. These considerations show that an administratrix retains her character of administratrix notwith-

standing her marriage, and thus comes within the letter of the statute.

In an old case of *Da Rosa v. De Pinna*, 6 Eng. Ecc. 167, note, S. C., 2 Lee, 888, a *feme covert* to whom administration had been decreed was not allowed, on an appeal from the decree, to renounce the administration to the prejudice of her husband, who objected to it. By the English ecclesiastical law, there was not an unqualified right of renunciation or resignation of an administration: 1 Williams on Executors, 484; *McGowan v. Ward*, 3 Yerg. 375; *Washington v. Blunt*, 8 Ired. Eq. 253. The English ecclesiastical court could, therefore, exercise its power of allowing a renunciation by a *feme covert* in reference to the husband's wishes. The law here is different. There is here a right to resign. There is no qualification of that right, and the court is not clothed with authority to make its exercise dependent upon the husband's will.

It would be inconsistent with the spirit of the law, which prescribes the incapacity of a *feme covert*, to imply the disability of a married woman to resign her administration. The protection of the wife is one of the objects of the law in the imposition of her disabilities. The resignation of an administration is a means by which a wife could protect herself against irreparable loss by the misconduct of a husband inducted into the administration by his intermarriage with her. To take away from her the right of resignation which the statute gives would therefore deprive her of a means of self-protection given by the statute. Her protection would not be consulted by implying a disability in her to resign. The wife's safety and protection will be less endangered by allowing her the exercise of her will in resigning an administration than by leaving her without the means of ending her liability for her husband's misconduct.

For the reasons above set forth, we decide that a *feme covert* administratrix has a right to resign her administration. Her resignation must of necessity terminate the administration of her husband, which exists only by virtue of her administration.

The verdict in this case is substantially correct and proper in form, as a verdict in the action of detinue. The judgment, however, is not the appropriate one. The error in it is merely clerical, and must here be corrected. The judgment, being thus corrected, is affirmed: See Code, sec. 3037; *Jackson v. Shipman*, 28 Ala. 488.

WHITE v. HASS.

[32 ALABAMA, 430.]

ALTERATION OF NOTE BY ERASURE OF PLACE OF PAYMENT, after delivery to the payee, is presumed to have been made by the payee, and unless the assent of the maker is proved, renders the note void.

THOUGH PROMISSORY NOTE NOT UNDER SEAL MAY NOT BE MERGER OF CONTRACT for which it was given, yet the payee cannot recover on the original consideration, if his recovery on the note is defeated by proof of a material alteration by him, without the assent of the maker, the effect of which was to render the note void.

GENERAL CHARGE ON EVIDENCE IN FAVOR OF PARTY is invasion of province of jury, where an inference of fact is necessary to be drawn before such party is entitled to recover.

ACTION on promissory note by payee against maker. From the evidence, it appeared that the note, after delivery to the payee, had been altered, so as to show an erasure and change of the place of payment. The remaining facts appear in the opinion.

E. C. Bullock, for the appellant.

James L. Pugh, contra.

By Court, **RICE, C. J.** The alteration of the note was material, and appears to have been made after its delivery to the payee. The presumption is that the alteration was made by him; and it is well settled that such alteration of a note by the payee, without the assent of the maker, renders the note void. The alteration being shown, and the presumption arising that it was made by the payee, the burden was upon him to prove the assent of the maker to it. If he failed to make that proof, he was not entitled to recover, either upon the note, or under any count founded on the same consideration with the note. For although the note, not being under seal, may not be a merger of the contract for which it was given, yet as the note was at first valid, there can be no recovery on the contract unless the note still continues valid, and is produced in evidence, or proved to have been lost by time or accident. And to allow the payee, after he had designedly made a material alteration in the note without the assent of the maker, to recover upon the contract for which the note was given, would be to depart from the sound and just principle that "no one shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected:" *Master v. Miller*, 4 T. R. 329; *Martendale v. Follett*, 1 N. H. 95; *Chesley v. Frost*, Id.

145; *Humphreys v. Guillow*, 13 Id. 385; *Newell v. Mayberry*, 8 Leigh, 250 [23 Am. Dec. 261]; *Davidson v. Cooper*, 13 Mee. & W. 343; 1 Greenl. Ev., sec. 121.

We will not say that the facts proved by the evidence in the present case were not sufficient to justify the inference by the jury that the alteration was brought to the knowledge of the defendant; and that when brought to his knowledge he assented to it. But the court is not authorized, in such a case, to draw an inference of fact; and without such inference, the facts proved did not warrant the court to declare, as a conclusion of law, that the defendant had assented to the alteration. As his assent is not stated by any witness, nor admitted, the court should have left it to the jury to determine whether or not he had assented to the alteration; and should have charged them that if they believed he had assented to it, they should find for the plaintiff the amount of the note and interest. But instead of doing so, the court charged the jury that if they believed all the evidence, they must find for the plaintiff the amount of the note and interest. In thus charging, the court erred, because thereby it took from the jury the determination of the question of fact, whether the defendant had or had not assented to the alteration.

For the error above pointed out, the judgment is reversed and the cause remanded!

MATERIAL ALTERATION OF COMMERCIAL PAPER RENDERS IT VOID: See *Miller v. Reed*, 67 Am. Dec. 459, and note 462, citing prior cases. The law ordinarily presumes that an alteration of an instrument was made at or prior to the execution, in the absence of intrinsic or extrinsic evidence: *Neil v. Case*, 25 Kan. 516, citing the principal case.

WRITTEN AGREEMENT OPERATING TO MERGE ORIGINAL PROMISE, if altered so as to render it void, cannot be disregarded or avoided so as to allow resort to the original contract: See *Matteson v. Ellsworth*, 55 Wis. 500, citing the principal case.

WISWALL v. STEWART & EASTON.

[32 ALABAMA, 433.]

PURCHASE BY TRUSTEE OF OUTSTANDING CLAIMS OR TITLES inures to the benefit of the *cestui que trust*, on his election being expressed within a reasonable time.

CESTUI QUE TRUST, ELECTING NOT TO CONSIDER TRUSTEES' PURCHASE OF OUTSTANDING DISPUTED CLAIMS as being made on his account, and engaging in a protracted litigation with them for the establishment of their legal title under the purchase, cannot, after the lapse of six years from

the purchase, and after a court of law has decided in favor of the trustees, come into a court of equity and have the purchase held for his benefit.

BILL in equity to establish resulting trust in lands from purchase by trustee of outstanding claims adverse to the interests of the *cestui que trust*. The remaining facts are stated in the opinion.

K. B. Sewall, for the appellant.

George N. Stewart, contra.

By Court, WALKER, J. It is unquestionably the law that a *cestui que trust* has the option to take the benefit of any purchase, which the trustee may make, of claims or titles adverse to the trust estate, upon reimbursing the trustee to the extent of his outlay; but it is equally certain that the *cestui que trust* must signify his election to affirm the purchase of the trustee, and take the benefit of it within a reasonable time: *Keech v. Sanford*, White & Tudor's Lead. Cas. in Eq. 53-56, notes, 63 Law Lib.; *Scott v. Freeland*, 7 Smed. & M. 409 [45 Am. Dec. 310]; *Hawley v. Cramer*, 4 Cow. 716; Willard's Eq. 180; Hill on Trustees, 536, 382; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Jackson v. Walsh*, 14 Johns. 407; *Charles v. Dubose*, 29 Ala. 367.

Whether or not the election of the *cestui que trust* has been seasonably expressed is not determined by any fixed rule, but depends upon the circumstances of the case. It becomes necessary, therefore, for us to look into the circumstances of this case, to ascertain whether the election of the complainant to take the benefit of the purchase made by the defendants was seasonably expressed. The purchase of defendants was made nearly six years before the bill was filed, which was the first intimation by the complainant, so far as we are advised, of an intention or wish to treat the purchase as made for his benefit. The complainant knew of the purchase, either at the time it was made or within a short time thereafter. He had reason to believe that the defendants purchased with a view to let him have the land in payment of debts due him. After the purchase the complainant repudiated it as one to which he would not consent. At the time of the purchase the land was held by one Seabury, who had conveyed to a trustee for the benefit of the complainant, by deed of trust for the security of a debt, and who held under some arrangement with the complainant, whereby the latter forbore to foreclose his deed of trust. Seabury denied the title acquired by the purchase of the defend-

ants, who instituted an action of ejectment, of which it is inferable the complainant was cognizant, and which continued for several years. Pending the action of ejectment, Seabury conveyed to the complainant his entire interest in the land. In the action of ejectment, a judgment was rendered for the defendants, from which a writ of error to this court was sued out. In this court the judgment of the circuit court in the action of ejectment was affirmed. After the affirmance of that judgment for the first time, the complainant, by filing the bill in this case, claimed that the purchase by defendants should be treated as one made for his benefit. When the defendants bought, they gave certainly the full value of the land, and more than the complainant had offered, or was willing to give. The land afterwards continued to deteriorate, and its value depreciated for some time; but the bill and testimony authorize the conclusion that its value increased before the commencement of this suit.

Under these circumstances, shall we hold that the complainant has, within a reasonable time, signified his election to take the benefit of the purchase made by the defendants? Shall the complainant repudiate the purchase at first, when the land is of but little value, and when the title is disputed; permit the defendants to pay for the same, and lie out of the use of their money for nearly six years; dispute the title derived by them, and permit it to be controverted in the name of another, really for his benefit, in a long litigation in the circuit and supreme courts; and after the title is established, and the land has probably become valuable, come in at the expiration of a period of near six years, and claim for the first time that he affirms the sale, and claims the benefit of it? There is neither authority, reason, nor moral right for permitting him to do so. The defendants in this case have been guilty of no fraud. Conceding to the complainant every other point which he claims, the justice, right, and law of this case are against him upon the point we have considered; and therefore, without considering any other question, we affirm the decree of the court below.

TRUSTEE PURCHASING OUTSTANDING TITLE ADVERSE to that of *cestui que trust* acquires the same for the benefit of the *cestui que trust* only: See *Jewett v. Miller*, 61 Am. Dec. 751, and note 756, citing cases.

McCLURE & Co. v. COX, BRAINARD, & Co.

[32 ALABAMA, 617.]

IN CONSTRUCTION OF BILL OF LADING, PAROL EVIDENCE IS ADMISSIBLE to show that the words "dangers of the river," by usage and custom, include dangers by fire.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN RECITAL IN BILL OF LADING that cotton was shipped on a steamboat, of a custom for steamboats to carry barges in tow, and to store freight at their option, either on boat or barge. STONE, J., dissenting.

"UNIVERSAL PRACTICE AND UNDERSTANDING OF PERSONS EMPLOYED IN NAVIGATING" PARTICULAR RIVER will not, of itself, constitute a custom.

ACTION against common carriers for loss of cotton. The remaining facts are stated in the opinion.

William Boyles, for the appellants.

George N. Stewart, contra.

By Court, **RICE, C. J.** It is settled in this state that it is permissible for the owner of a steamboat, when sued for the loss of goods by fire, to show by parol that the exceptive words, "dangers of the river," in a bill of lading, by custom and usage include dangers by fire: *Sampson v. Gassam*, 6 Port. 123 [30 Am. Dec. 578]; *Hibler v. McCartney*, 31 Ala. 501.

"In mercantile contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of those usages. They commonly reduce to writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. Such contracts are very commonly framed in a language peculiar to those engaged in the particular trade out of which they arise. . . . The intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted to expound it, and to arrive at its true meaning. . . . But in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract, without altering its

effect more or less." Neither, in the construction of such contracts, will the evidence be excluded "because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that." The best test by which to determine the existence or non-existence of such repugnancy or inconsistency as will exclude the proposed evidence of the custom and usage is to inquire whether the explanation furnished by the evidence is "such as, if expressed in the written contract, would make it insensible or inconsistent:" *Brown v. Byrne*, 3 El. & Bl. 704, 77 Eng. Com. L.; *Humfrey v. Dale*, in the court of queen's bench, January, 1857, 5 Am. Law Reg. 51; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Brown v. Brown*, 8 Met. 573; *Smith v. Mobile etc. Ins. Co.*, 30 Ala. 167; *Marine Dock etc. Ins. Co. v. McMillan*, 31 Id. 711; S. C., 27 Id. 77; see also the notes to *Wigglesworth v. Dallison*, 1 Smith's Lead. Cas. 677, 685; *Barber v. Brace*, 3 Conn. 10 [8 Am. Dec. 149].

With the law as above laid down for our guidance, we are now to consider whether the court below erred in permitting the defendants, after the bill of lading had been read in evidence reciting that the cotton was shipped on the steamer Pink Toney, to introduce evidence tending to show "that the steamboat had a barge in tow, the water being low; that it was usual and customary for boats to have and use barges in tow in low water; that this was known to the shipper, who was the warehouseman, and who was present when the cotton was put on the boat; that it was considered the usual privilege of the boat so to carry it; and that it was the universal practice and understanding, when a boat had a barge in tow, that the freight was to be put upon the barge or the boat."

It is evident that this evidence tended to show a custom of the particular trade; that the parties to this suit, at the time of the contract evidenced by the bill of lading, were cognizant of that custom; that they contracted with a tacit reference to it; and that in fact the very contract on which the plaintiff founds his right was made with the usage or custom understood to be a term in it. "To exclude the usage is to exclude a material term of the contract, and must lead to an unjust decision. It is," as Lord Campbell, C. J., says, "the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when

they are to determine on the controversies which grow out of them:" See *Humfrey v. Dale*, 5 Am. Law Reg. 51.

It may be exceedingly difficult to draw the precise line of distinction between cases in which evidence of usage and custom ought to be admitted and cases in which it ought not to be admitted; but there can be none in saying that there are cases in which such evidence must be received. And in perhaps the strongest English case against such evidence, Lord Denman, C. J., was not willing, in view of the authorities, to put his opposition to it in stronger language than the following: "But the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract:" *Trueman v. Loder*, 11 Ad. & El. 589; see also *Barlow v. Lambert*, 28 Ala. 704, which certainly goes no further than *Trueman v. Loder*, *supra*.

Now, it seems clear that the evidence of usage and custom offered in the present case does not labor under the objection of introducing anything repugnant to or inconsistent with the tenor of the written contract, in the sense in which we have above defined repugnancy or inconsistency—the sense in which that objection must be understood in cases of this kind. That evidence goes no further than to furnish "the explanation of words used [in the bill of lading] in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract." It tends to show that the words "on the steamer," used in the bill of lading, were used "in a new, peculiar, or technical sense" in the particular trade; and that, by this new, peculiar, or technical sense, the barge towed by the steamboat in low stages of water was included in the term "steamer or steamboat," so far at least as to secure to the commander of the boat the privilege of stowing the cotton on either the boat or barge. If the explanation or addition thus derived from the evidence of the custom had been expressed in the bill of lading, it would not have rendered the bill of lading insensible or inconsistent. It is obvious that the bill of lading would not be rendered insensible or inconsistent by the expression therein of the privilege to the commander of the steamboat to stow the cotton on the boat, or on the barge towed by her, in accordance with the custom.

Applying the law as above laid down to the case as presented by the record, it is the opinion of a majority of the court that there is no error, except in the charge first excepted to. That

charge is understood by a majority of the court to authorize a verdict for the defendant upon proof of "the universal practice and understanding of persons employed in navigating said river" to carry cotton on the barge in tow, without proof that any word or phrase of the contract had, by virtue of a lawful custom, come to be understood in a sense which gave the carrier a right to carry on the barge. That charge makes the case turn upon the practice of the carriers, and their understanding of that practice, varying the contract; and not upon the right of the carrier under the contract, when explained and expounded in reference to the peculiar meaning of its words, as established by a valid custom. And in this respect that charge was erroneous.

As the cause must be remanded for another trial, we deem it proper to say that we do not wish to be understood as passing upon the sufficiency of the evidence to establish the customs in dispute. We decide nothing more than that the evidence objected to was, on account of its tendency, admissible; and that, in view of the evidence, all the charges and refusals to charge were appropriate and free from error, except the first charge, the error of which we have above pointed out. For that error, the judgment is reversed and the cause remanded.

STONE, J., concurred in all the legal principles declared by the chief justice, except in the ruling admitting testimony to vary the contract effect of the words "on the steamer Pink Toney," as used in the bill of lading, and to show a custom for such steamboats, under such contracts, to carry barges in tow, and to store freight, at their option, on the boat or the barge. Regarding this ruling, the justice held that the testimony did not establish a mercantile custom, but rather a habit of boatmen to so carry goods, and that such words, in mercantile usage, had not a well-known meaning peculiar to the particular business; that therefore such contract would bind the boat-owners to carry the goods on the boat, or render them liable for injury arising from doing otherwise, citing *Brown v. Byrne*, 3 El. & Bl. 702; *Smith v. Mobile Nav. etc. Co.*, 30 Ala. 167; *Barlow v. Lambert*, 28 Id. 704; *Thorp v. Sugli*, 33 Id. 339; *Bazin v. Liverpool & P. S. Co.*, 3 Wall. jun. 229.

BILLS OF LADING, PAROL EVIDENCE TO VARY OR EXPLAIN: *Chandler v. Sprague*, 38 Am. Dec. 404; note to *Rochester Bank v. Jones*, 55 Id. 300; *Cox v. Peterson*, 68 Id. 145; admissibility of custom to explain: *Barlow v. Lambert*, 65 Id. 374, and note 379; *Spears v. Ward*, 48 Ind. 545, the latter citing the principal case.

BLACKWELL'S ADMINISTRATOR v. BLACKWELL'S DISTRIBUTEES.

[38 ALABAMA, 57.]

DISTRIBUTEES MAY CHARGE ADMINISTRATORS WHO CONVERT PROPERTY OF ESTATE into other specific effects with the value of the converted property, or may elect to claim and pursue the property for which it has been exchanged.

EXECUTORS AND ADMINISTRATORS CANNOT INVOKE STATUTE OF LIMITATIONS to protect their possessions against the claim of distributees, unless they have denied the continuance of the trust, or set up claim in their own right.

SETTLEMENT AND PAYMENT OF DISTRIBUTIVE INTERESTS ARE ORDINARILY PRESUMED after a lapse of twenty years from the time when the executor or administrator should have settled the administration.

SETTLEMENT AND PAYMENT OF DISTRIBUTIVE INTERESTS ARE NOT PRESUMED from lapse of twenty years after the administration should have been settled, when the personal representative holds not in his own right, but in subordination to and recognition of the rights of the *cestui que trust*.

AMENDMENT TO BILL DOES NOT MAKE NEW CASE, AND IS PROPERLY ALLOWED in a case where the bill is filed by a husband as sole legatee of his wife to recover her distributive share in her father's estate, and the amended bill exhibited a marriage contract which secured to him a life estate in his wife's personalty, and to her a separate estate in the remainder; for both titles set out give him the entire interest in the subject-matter.

TWO PERSONS ARE PROPERLY JOINED AS PLAINTIFFS IN BILL IN EQUITY when both are interested in the property to be recovered, although their interests are not co-extensive.

WIFE'S PERSONAL REPRESENTATIVE MAY JOIN WITH HUSBAND IN BILL to recover her distributive share of her father's estate, where the bill shows that a marriage contract secures to the husband a life estate in the wife's personalty, with a separate estate in remainder to her, and that the husband is made, by the wife's will, her sole legatee.

ADMINISTRATOR, WHO QUALIFIES AFTER FILING OF BILL TO RECOVER DECEDENT'S PROPERTY, may be brought in as co-complainant therein by means of a supplemental bill, for the grant of letters relates to the time of the death.

THERE MUST BE ADMINISTRATOR OF ESTATE OF WHICH DISTRIBUTION IS sought, and he must be made party to suit; it is not sufficient to file the bill against the personal representative of the deceased administrator, but an administrator *de bonis non* must be appointed.

BILL by Vastbinder and other distributees of the estate of Nathan Blackwell, deceased, seeking to compel James Blackwell, the administrator of Mrs. Priscilla Blackwell, deceased, who had been the widow and administratrix of Nathan Blackwell, to make a settlement of Nathan Blackwell's estate, and

seeking to recover the distributive share of the estate which Vastbinder claimed as sole legatee of his deceased wife, who was the daughter of Nathan Blackwell. The opinion states the case.

Thomas Williams, for the appellant.

Pegues and Dawson, contra

By Court, **STONE, J.** Our first impression was to dismiss the bill in this case on account of the staleness of the demand. Looking more closely into the record, we think that position indefensible. True, near forty years elapsed between the qualification of Mrs. Priscilla Blackwell as administratrix and the exhibition of the original bill. True, the property which is ordered to be distributed under the chancellor's decree was purchased about fifteen years after the death of Nathan Blackwell, the intestate. Under these circumstances, if they stood alone, we would feel bound by our former decisions to hold that this claim could not be maintained: See *Rhodes v. Turner*, 21 Ala. 210; *Barnett v. Tarrance*, 23 Id. 463; *McArthur v. Carrie's Adm'r*, 32 Id. 75 [*ante*, p. 529].

These facts, however, do not stand alone. The proof tends strongly to show that the slaves Rose and Polly, from whom the other slaves in controversy have descended, were purchased mainly, if not entirely, with means derived from the stock of cattle left by Nathan Blackwell at the time of his death. This, however, would not take the case out of the operation of the principle above asserted.

The proof in this record further shows that Mrs. Blackwell and most of her children lived together as one family, after the death of Nathan Blackwell, for a period of between thirty and forty years; that all labored for the promotion of the common interest and for the common support of the family; and that the increase of the property was aided materially by such common labor, and by a system of rigid economy which all seem to have observed. On these facts, if they stood unexplained, we would feel it our duty to hold that Mrs. Priscilla Blackwell and her children held these slaves as tenants in common. If these were the only facts, possibly no relief could be obtained under the pleadings in this record, because of a variance between the allegations and the proof: *Lockhart v. Cameron*, 29 Ala. 355; *Williams v. Barnes*, 28 Id. 618.

But there is another feature of this record which must exert an influence in this connection. The sons of Mrs. Blackwell,

who might assert some claim to these slaves under the principle last considered, and who lived with her up to the time of her death, have not asserted that claim; and after her death, they have conceded that the slaves are the property of her estate. In fact, it does not appear that they ever did set up any claim to this property in their own right, or that they have ever preferred any claim for the labor and services bestowed by them, either against their mother in her own right, or as the representative of their father's estate. According, then, to their concessions, this property has all the time been owned by their mother.

On the other hand, the bill avers, and the proof shows, that Mrs. Priscilla Blackwell has not claimed this property in her own right. After the marriage of her daughter Sarah to Mr. Vastbinder, in 1841, she spoke of these slaves as belonging to her husband Nathan Blackwell's estate, and expressed a wish that they should be divided among her children. She expressly distinguished between these slaves and other property confessedly hers.

Under the circumstances disclosed in this record, we think certain well ascertained and defined legal principles demonstrate the right of Nathan Blackwell's distributees to have distribution of the slaves Rose and Polly, and their increase, subject to the contingency and qualification after stated.

Where administrators convert the property of the estate into other specific and traceable effects, the distributees may charge them with the value of the converted property, or may elect to claim and pursue the property for which it has been exchanged: *Kavanaugh v. Thompson*, 16 Ala. 817.

Trustees, such as executors and administrators, cannot invoke the statute of limitations to protect their possessions against the claim of distributees, unless they have denied the continuance of the trust, or set up claim in their own right: *Angell on Limitations*, secs. 168-174.

Although after the lapse of twenty years from the time when Mrs. Blackwell should have settled her administration, we would, under ordinary circumstances, presume a settlement and payment of the distributive interests; yet when the trustee holds, not in his own right, but in subordination to and recognition of the rights of the *cestui que trust*, this presumption from mere lapse of time is repelled, and the bar is not perfected: *McArthur v. Carrie's Adm'r*, 32 Ala. 75 [*ante*, p. 529], and authorities cited; *Milton v. Haden*, Id. 30 [*ante*, p. 523]; *Cholmondeley v. Clinton*, 2 Jac. & W. 1; *Angell on Limitations*, sec. 164.

at the time of her death, owed no debts; and no issue has been formed on this averment.

The only difference between the right which Mr. Vastbinder asserts in his original bill and that which he presents in his amended bill consists in the different channels through which the interest accrues to him. Each state of case gives him the entire interest: the former as sole legatee of his wife's unincumbered distributive interest in Nathan Blackwell's estate; the latter as owner of a life estate under the marriage contract, and the remainder as sole legatee under his wife's will.

In *Ingraham v. Foster*, 31 Ala. 123, we sanctioned an amendment which departed from the original bill in a particular more important than this. We in that case employed the following language: "To make an amendment improper, it is not enough that there be a mere inconsistency or repugnancy of allegation. There must be an inconsistency or repugnancy in the purposes of the bill, as contradistinguished from a modification of the relief. One of the purposes of a chancery amendment is to correct an erroneous statement of the facts." We hold that the amendment in this case did not make a new case. See also *Larkins v. Biddle*, 21 Id. 252.

2. The original bill was filed in the name of Mr. Vastbinder alone. A supplemental bill brought in the personal representative of Mrs. Vastbinder as co-complainant. It is contended here that Mr. Vastbinder had no such interest in the distributive share of Mrs. Vastbinder as authorized him to unite with her personal representative in a bill for its recovery. We might content ourselves, in answer to this objection, with simply stating that under the marriage contract Mr. Vastbinder has a valuable interest, and the personal representative of Mrs. Vastbinder has also an interest. Both are interested in the property to be recovered, although their interests are not co-extensive. This renders them proper, if not necessary, parties: 1 Daniell's Ch. Pr. 272.

There is at least one adjudged case which goes further, and holds that even if Mr. Vastbinder had no other interest than as legatee of Mrs. Vastbinder, he might unite with her personal representative in a chancery suit for the recovery of her distributive interest; and this would furnish no error of which the defendants could take advantage: *Rhodes v. Warburton*, 6 Sim. 617, 9 Eng. Ch.; Story's Eq. Pl., sec. 510; 1 Daniell's Ch. Pr. 251. We hold there was no misjoinder of complainants.

3. As Mrs. Vastbinder had no personal representative at the

time the original bill was filed, and as such personal representative is a necessary party to this suit, it may be contended that it was irregular to make the executor, who afterwards qualified, a co-complainant; and that this irregularity vitiates the complainants' bill. In a case involving this precise question the amendment was held regular; the court remarking that "the grant of letters of administration related to the time of the death, like the case where an executor, before his proving the will, brings a bill; yet his subsequent proving the will makes such bill a good one: *Humphreys v. Humphreys*, 3 P. Wms. 349; 1 Daniell's Ch. Pr. 460, 461. This amendment was properly allowed.

The slaves Rose and Polly, and their increase, still remain in specie. According to the principles above settled, they are, either in whole or in part, the property of the estate of Nathan Blackwell, deceased. An inquiry may become necessary to determine whether the entire property or only an interest in it belongs to the estate of Nathan Blackwell; and if only a partial interest, to what extent that interest goes. On the trial of that issue, and the settlement of Mr. Blackwell's estate, there should be some one to represent that estate. Since the death of Mrs. Priscilla Blackwell, there has been no administrator of said Nathan's estate. It has been settled in this state that in such case it is indispensable that there should be an administrator of the estate of which distribution is claimed, and that such administrator shall be made a party to the suit. This principle rests on solid reasons, and is well supported by authority: *Gardner v. Gantt*, 19 Ala. 666; *Robinson v. Robinson*, 11 Id. 947; *Logan v. Fairlie*, 2 Sim. & St. 284; *Alexander v. Stewart*, 8 Gill & J. 226; *Moor v. Blagrove*, 1 Ch. Cas. 277; 1 Daniell's Ch. Pr. 253; Story's Eq. Pl., sec. 172.

For the errors above pointed out, the decree of the chancellor must be reversed, and the cause remanded. The complainants can apply for leave to perfect their pleadings after the proper court shall have appointed an administrator *de bonis non* to the estate of Nathan Blackwell, deceased: *Bloodgood v. Hartley*, 16 Ala. 233. Let the appellees pay the costs of this appeal, to be paid out of the assets of the estates they severally represent.

ADMINISTRATORS ARE PERSONALLY LIABLE FOR ANY MISAPPLICATION OF ASSETS without order of court: *Flory v. Becker*, 45 Am. Dec. 610; *Lang v. Brown*, 56 Id. 244; *Potts v. Smith*, 24 Id. 359.

ADMINISTRATION IS PRESUMED TO HAVE TERMINATED at the end of the period fixed by law: *Easterling v. Blythe*, 56 Am. Dec. 45.

ADMINISTRATOR CANNOT SET UP STATUTE OF LIMITATIONS in bar of those entitled to the assets: *Rubey v. Barnett*, 49 Am. Dec. 112.

PARTIES HAVING COMMON THOUGH NOT JOINT INTEREST may join in bill in equity: *Murray v. Hay*, 43 Am. Dec. 773; *De Louis v. Meek*, 50 Id. 491.

EXECUTOR OR ADMINISTRATOR IS INDISPENSABLE PARTY to bill to obtain distribution: *Porter v. Porter*, 40 Am. Dec. 55.

CITY COUNCIL OF MONTGOMERY v. GILMER.

[83 ALABAMA, 116.]

MUNICIPAL CORPORATION, IN CONSTRUCTION OF SEWERS, ACTS MINISTERIALLY, and is responsible for damages caused by the careless and negligent manner in which it discharges that duty.

ALLEGATION IN DECLARATION AGAINST CITY THAT DEFENDANT "WRONGLY" PERMITTED WATER TO FLOW from its sewers upon plaintiff's lots, "wrongfully" refused to repair streets, etc., is demurrable as stating a conclusion of law; the declaration should set forth the facts from which the conclusion of wrongfulness may be deduced.

DECLARATION AGAINST CITY ALLEGING NEGLECT TO REPAIR STREETS fails to state a cause of action if it does not show that the alleged damage resulted from that breach of duty.

CITY IS NOT PRIMA FACIE RESPONSIBLE FOR INJURY CAUSED BY FLOW OF RAIN-WATER from the streets upon adjacent lands, since its duty to adopt a system of drainage is legislative.

MOTIVES OR MALICE OF MEMBERS OF CITY COUNCIL IN REFUSING TO REPAIR STREETS is immaterial and irrelevant in an action against the city for neglect to repair streets.

MUNICIPAL CORPORATION IS NOT RESPONSIBLE FOR MALICE OF ITS OFFICERS. IT IS COMPETENT TO PROVE THAT MUNICIPAL CORPORATION refused or failed, when informed of the condition of the street, to repair it, since this tends to establish the fact of negligence.

EVIDENCE THAT CITY WAS INFORMED AT MEETING OF ITS COUNCIL, through the report of a committee, that some slight repairs had been made upon a ravine in the street, is admissible as conducing to show a recognition of the street as a city street, and that the corporation was informed of the character of the repair of the street, which the plaintiff contended was insufficient.

PRACTICAL BRICK-MASON WHO HAD BEEN ENGAGED IN CONSTRUCTION OF WALL between plaintiff's land and the street is competent to give his opinion as an expert upon the capacity of the wall to withstand the flow of rain-water on the inner side of the wall upon the plaintiff's land, in an action against a city for the undermining of the wall by the flow of surface water against the outer side of the wall.

EXCEPTION TO INSTRUCTION MUST BE TAKEN BEFORE JURY LEAVE BAR.

DECISION OF SUPREME COURT UPON FORMER APPEAL IS LAW OF CASE, and not open to revision on second appeal; therefore, if that decision asserts that upon the evidence the plaintiff could not recover, it is conclusive as to his right of recovery upon such evidence at a second trial, and instructions or pleadings to a contrary effect are erroneous.

MUNICIPAL CORPORATION IS NOT REQUIRED TO PREVENT FLOW OF WATER which would be detrimental to contemplated erection, after notification of the owner's intention to build upon his lots; the duty of repairing streets does not involve a duty to protect adjacent lands from a natural flow of water.

ACTION by Gilmer & Taylor to recover damages for the defendant's negligence in permitting rain-water to run from a street upon the plaintiffs' lots, thereby injuring them. This case was formerly before this court, and is reported in 26 Ala. 665. The cause was then remanded, a second trial was had, and the defendant now appeals upon exceptions to rulings of the court upon the pleadings, evidence, and instructions. The damage resulted chiefly from the fact that in a street which had not been used for some time, and which was adjacent to the plaintiffs' land, a ravine of considerable width and depth had formed, which extended down the course of the street, in which flowed the rain-water accumulated from many other streets. The ravine encroached upon the plaintiffs' lots, and they built a brick wall along the line of their lots to protect them from the overflow, and a considerable length of the wall was erected upon the bottom of the ravine. Part of the damage was the undermining and washing away of this wall, and the evidence showed that water flowing off from the plaintiffs' lots ran down on the inside of the wall; and hereupon the testimony of a practical brick-mason who had aided in the construction the wall was introduced, against the defendant's objection. He testified that the rain that fell within the wall was not sufficient to wash it down. The case is otherwise sufficiently stated in the opinion.

Baine & NeSmith, and Watts, Judge, and Jackson, for the appellant.

Elmore and Yancey, contra.

By Court, WALKER, J. The first count of the declaration alleges that the corporation wrongfully and unjustly erected a sewer and gutter for the purpose of conducting the water through and from certain streets; and that the erection was made in such a careless, negligent, and improper manner that by reason thereof large quantities of water flowed upon and damaged the plaintiffs' neighboring lots. Notwithstanding there is some conflict of authority upon the subject, we think the doctrine that a municipal corporation, in the construction of sewers, acts ministerially, and is responsible for damages caused by the care-

less and negligent manner in which it discharges that duty, is consistent with reason, demanded by justice, and supported by a preponderance of authority. We therefore adopt it: *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463 [53 Am. Dec. 316]; *Lloyd v. Mayor etc. of New York*, 5 Id. 369 [55 Am. Dec. 347]; *Delmonico v. Mayor etc. of New York*, 1 Sandf. 222; *Meares v. Commissioners*, 9 Ired. L. 73 [49 Am. Dec. 412]; *Mayor etc. of New York v. Furze*, 3 Hill (N. Y.), 612; *Smoot v. Mayor of Wetumpka*, 24 Ala. 112; *Dargan v. Mayor etc. of Mobile*, 31 Id. 469 [*ante*, p. 505], where several cases bearing upon the question are collated. It necessarily results from the adoption by us of this doctrine, that we must approve the action of the court below in overruling the demurrer to the first count.

The court erred in overruling the demurrer to the second count of the declaration. The object of that count was the recovery of damages for the defendant's wrongful suffering and permitting the water to flow from the sewers on the street upon the plaintiffs' lots. If the defendant did wrongfully permit the water to flow from its sewers upon the plaintiffs' lots, and thus cause damage, the plaintiff has a right of action. But whether the allowing of the water to flow from the sewers upon the land of plaintiffs was wrongful, is a question of law. The facts being ascertained, it is a question of law whether it was the duty of the corporation to prevent the flow of the water upon the plaintiffs' lots, or whether it committed a wrong upon the plaintiffs in permitting the water so to flow. It was not sufficient for the plaintiffs to aver the conclusion of law. They should have set forth the facts from which that conclusion is deducible: *McKeagg v. Collehan*, 13 Ala. 828; *Clay v. Dennis*, 3 Id. 375; *Giles v. Williams*, 3 Id. 316 [37 Am. Dec. 692]; *Savage v. Walshe*, 26 Id. 619; *Nelson v. Iverson*, 24 Id. 9 [60 Am. Dec. 442].

The third count is obnoxious to a similar objection with the second. The averment of this count is, that the defendant wrongfully and unjustly permitted the adjacent street to remain out of repair, and wrongfully and unjustly refused to repair the same, and wrongfully and unjustly suffered a large quantity of rain-water to run down the street which was out of repair, to, in, against, and upon the plaintiffs' lots, and thereby caused the plaintiffs' brick wall to be undermined and to fall, and other specified damage to be done.

This count does not attribute the damage done to the neglected condition of the street, either directly or indirectly. It does not show that the neglected condition of the street was the

immediate cause of the damage, or the cause of the flow of rain down the street to, in, against, and upon the plaintiffs' lot. It was a duty of the corporation, devolved upon it by its charter, to keep the street in repair, and the third count shows a breach of that duty; but it fails to show a right of action in the plaintiffs, as a consequence of that breach of duty, because it does not appear from the declaration that damage resulted to the plaintiffs from that breach of duty. If it were shown to have been a legal duty of the corporation to have prevented the flow of the rain-water down the street to, in, against, and upon the plaintiffs' lots, then the plaintiffs might recover the damages caused by such flow of water. We attach no importance to the qualification of suffering the water to flow as it did by the words "wrongfully and unjustly," because whether the failure to prevent such flow of water was wrongful and unjust is a question of law. It is not *prima facie* the legal duty of a municipal corporation to prevent the flow of rain-water from the streets upon the adjacent lands, for the omission of which an action may be maintained. It is unquestionably a duty which it owes to its community to adopt a judicious system of drainage, whereby the water falling upon the city may be conducted with as little detriment as possible. But this, like the duties of making and enforcing proper quarantine and sanitary regulations, is a legislative duty, embraced in the general obligation to provide for the general welfare of its people, and must be left, like other governmental powers, to the discretion of the corporate authorities: *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

If there are any circumstances in this case which render the corporation responsible for the flow of the water, and the damage done thereby, they are not shown in the count under consideration, and the demurrer should have been sustained to it.

The plaintiffs were permitted to prove that at a regular meeting of the city council some of the members expressed themselves as willing to repair the ravine if the plaintiffs would give up certain wharf privileges which they were claiming. This evidence was illegal. The motives which may have induced any member of the corporation to withhold his support from a proposition to make the repairs upon the street was a matter wholly immaterial and irrelevant.

The plaintiffs had no right to recover vindictive damages. No question of vindictive damages was involved in the case. It was competent to prove that the corporation refused or failed, when informed of the condition of the street, to repair it. Such

evidence tended to establish the fact of negligence. But the plaintiffs' right of action in no wise depended upon the motive of the refusal to support a proposition to repair on the part of any one of its members. For the same reason, the court erred in admitting evidence of the remarks of one of the aldermen indicating the existence of unkind feelings on his part towards one of the plaintiffs. If it had been proved that every member of the council was actuated by malice, it would have been entitled to no influence whatever upon this case. The corporation cannot, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs: *Wright v. Wilcox*, 19 Wend. 343 [32 Am. Dec. 507]. If the Ohio cases cited by the counsel for the appellee assert the proposition that a corporation is liable for the malicious motives which may have induced the members of its legislative assembly to decline the adoption of the resolutions or ordinances necessary to the performance of a duty imposed upon it by law, we are not willing to follow them. The court also erred in admitting the witness who was mayor in 1851 to prove that he would have been willing to have repaired the ravine if plaintiffs would have given up the wharf privileges claimed by them.

It was permissible for the plaintiffs to show that the corporation was, at a meeting of its council, informed through a report by one of its committees of the fact that some slight repairs were made upon the ravine in the street. The making of such a report to the council by the committee was a part of its proceedings, conducing to show a recognition of the street as one of the streets of the city; and at all events, the evidence was admissible, for the purpose of showing that the corporation was informed of the character of the repair of the street, which the plaintiffs contended was totally insufficient.

The evidence conduced to show that the wall of plaintiffs was built with a view to its capacity to resist the flow of water. The witness whose opinion was given as to the capacity of the wall to withstand the flow of water from the inside was a practical brick-mason, and had been engaged in the construction. He was, therefore, cognizant of the facts which affected the capacity of the wall to stand when a stream of water flowed upon it. He was also acquainted with the premises, and knew the sources for the accumulation of a volume of water within the wall. A brick-mason thus informed certainly must be deemed to have more than ordinary skill in the determination of the question whether the water flowing from the inside could wash down the

wall. A brick-mason must be supposed to possess more skill in determining the strength of a brick wall than persons usually have, especially if he was employed in the construction of the wall. The authorities, we think, fully authorize the conclusion that the opinion of the witness was admissible under the circumstances, as coming from an expert: 1 Greenl. Ev., sec. 440; *McCreary v. Turk*, 29 Ala. 244; *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249.

The two charges given by the court of its own motion were not excepted to until after the jury retired. There are many authorities which hold that an exception to the charge of the court may be taken at any time before the jury return their verdict; but we adopt the rule that the exception must be taken before the jury leave the bar, because it is supported by respectable authorities, has been for a long time universally recognized in practice in this state, and seems to rest upon a good reason. The reason is, that the court may have, at the time of giving the charge, an opportunity "for reconsidering and explaining it more fully to the jury:" *Phelps v. Mayer*, 15 How. 160; *Leigh v. Hodges*, 3 Scam. 15; *Hill v. Ward*, 2 Gilm. 285; *Wilson v. Owens*, 1 How. (Miss.) 126; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. 31. The two charges given by the court of its own motion are, therefore, not before us for revision.

The first, second, and fourth charges given upon the plaintiffs' request authorize a finding by the jury upon a state of facts which the evidence set forth in the bill of exceptions contained in the record when this case was before in this court conducted to prove. The tendency of the evidence found in the record of this cause when previously in this court was to show that the corporation had diverted water from its accustomed and natural flow, and so conducted it as to throw it upon the plaintiffs' lots, making no provision for its outlet without detriment to the plaintiffs, who had thereby sustained damage. It would have involved a violation of principle, not now disputable, for the court to have assumed the reverse of those facts, and prohibited to the jury the inference of them, if there was the slightest tendency of the evidence to their establishment. This court, by its former decision in this case, authorized the application to the evidence then before it of a charge that the jury, if crediting the testimony, should find for the defendant. We cannot affirm of that decision that it was predicated upon an erroneous assumption of fact, for it was not the province of the court to pass upon the facts, but to leave them, with all their tendencies, to

the arbitrament of the jury. The former decision must therefore be understood to assert that no state of facts which the evidence conduced to show authorized a verdict for the plaintiffs. As the evidence did conduce to show the state of facts presented in the hypothesis of the first, second, and fourth charges, that decision must be understood as denying the right of recovery upon those facts, and consequently as adjudicating against the correctness of such charges.

The decision on the former appeal cannot be regarded in the light of a mere *dictum*, but as a comprehensive adjudication, dispensing, by virtue of its conclusive effect upon the case presented, with the necessity of considering separately the questions arising upon the different aspects of the case. It is the law of this case, whether right or wrong, and we cannot now revise it: *Matthews v. Sands*, 29 Ala. 136.

The first, second, and fourth charges given upon the request of the plaintiffs are inconsistent with the decision on the former appeal, and are therefore erroneous. Upon the same principle, the demurrer to the fifth count should have been sustained. The averments of that count make out the same case substantially with the hypothesis presented in the first, second, and fourth charges. So also the evidence on the former appeal conduced to show the facts averred in the fourth count. Upon the facts set forth in the former bill of exceptions, it would have been manifestly improper for the court to have assumed the absence of evidence with such tendency, and thus have precluded the jury from passing on them. This (the fourth) count alleges, in substance, that Moulton street was out of repair; that it was permitted for a long time to remain out of repair; that in consequence of the street's so being and remaining out of repair the rain-water continued to tear up, wash, and carry away the soil, dirt, and earth of the street, and enlarge the space thus made in length, width, and depth, until finally a brick wall, erected on the plaintiffs' line for the protection of their lots from the rain-water, was thereby undermined and washed down, and other described damage done. The right of the plaintiff to recover upon those facts depends upon the question whether the corporation is responsible to adjacent land proprietors for injuries resulting to their lands from the omission of the corporation to repair, and keep in repair, the street upon which such lands are situated. There was certainly sufficient evidence before the court on the former trial to raise that question, and the decision that upon the evidence the plaintiffs

could not recover necessarily involves an adjudication of that question in the negative.

The court also erred in giving the third charge requested by plaintiffs. This charge, in effect, asserts the legal proposition that the corporation, within a reasonable time after notification of the owner's design to build upon unimproved lots, is required to prevent any flow of water which would be detrimental to the contemplated erection. Its sequence would be, that if there was an accustomed and natural flow of water from the street upon the unimproved lot of an adjacent proprietor, it would be the duty of the corporation to prevent it whenever it might be notified of the design to make an erection to which such flow would be prejudicial. The imposition of that duty would require the performance, not only of such acts as would keep the streets in repair, but of such as would also improve the adjacent lots, and cure natural deficiencies in them. The corporation would thus be made the obligated conservators and improvers of private property. The duty prescribed by the charter, of keeping the streets in repair, does not exact the performance of such acts as are necessary to protect adjacent lands from a natural flow of water, or to cure a natural fault of such lands. It follows that if the land proprietor makes an erection in a position to be injured by a natural and accustomed flow of the water, his damages are attributable to his own act, and not to a breach of duty by the corporation.

It may be contended that it is a legal duty of the corporation to repair the street, as a street; that if the corporation had discharged that duty, it would have diverted the water, and thus incidentally protected the plaintiffs' property; and that the plaintiffs may therefore recover. The third charge does not raise that question; but if it did, we should be bound to hold, as we have done in reference to the demurrer to the fourth count, that it was decided against the plaintiffs on the former appeal.

It is possible that the mind of the court was not directed, when the former appeal was tried, to all the points which are now pressed upon our attention, and that therefore the decision has really a wider scope than was intended. For that reason, we should not hesitate in another case, where we would not be shackled by the rule which makes a decision the law of the case in which it is made, to re-examine the question involved in that decision. We forbear to do so now, because the chief justice does not sit in this case, and whatever we might say would indicate the position of only a part of the court, and could

be but an expression of our opinions upon questions not before us.

What we have said disposes of all the material points of the case, and will be sufficient to guide the court on a future trial.

The judgment of the court below is reversed, and the cause remanded.

RICE, C. J., not sitting.

MUNICIPAL CORPORATIONS, LIABILITY OF, WITH RESPECT TO SEWERS AND SURFACE WATER: See note to *Perry v. City of Worcester*, 66 Am. Dec. 434-442.

MUNICIPAL CORPORATIONS, LIABILITY OF, FOR NEGLECT TO REPAIR STREETS: This subject is discussed in the note to *Browning v. City of Springfield*, 63 Am. Dec. 350-355; *James v. San Francisco*, 65 Id. 526.

MUNICIPAL CORPORATIONS NOT LIABLE IN EXEMPLARY DAMAGES: Note to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 389.

MECHANICS AS EXPERTS: See note to *Hammond v. Woodman*, 66 Am. Dec. 245.

EXCEPTIONS TO INSTRUCTIONS, WHEN TO BE TAKEN: *Anderson v. Hill*, 51 Am. Dec. 130.

DECISION ON PRIOR APPEAL IS LAW OF CASE: *Fortenberry v. Frazier*, 39 Am. Dec. 373, and note 376.

THE PRINCIPAL CASE IS CITED in *Roll v. City of Indianapolis*, 52 Ind. 500, generally upon the principles governing the liability of municipal corporations for injuries to private rights. This case holds that they are not so liable in the exercise of their judicial powers.

BURNS v. HAMILTON'S ADMINISTRATOR.

[83 ALABAMA, 210.]

RULE OF CAVEAT EMPTOR APPLIES TO SALES OF LAND UNDER ORDER OF PROBATE COURT.

PURCHASER OF LAND AT PROBATE SALE, WHO OBTAINS NO TITLE THEREBY, will not be relieved in equity from his purchase on the ground of ignorance of the legal effect of known facts affecting the title.

EQUITY WILL NOT RELIEVE PURCHASER OF LAND AT PROBATE SALE which transfers no title, when there is no mistake or ignorance of any material fact, no fraud nor warranty.

SALE OF DECEDENT'S LAND UNDER ORDER OF PROBATE COURT TRANSFERS NO TITLE, when the decedent, at the time of his death, had a mere pre-emption claim to the land, although the land is afterwards entered in the name of his heirs.

BILL in equity against the administrator and heirs at law of M. B. Hamilton, deceased. At the time of his death the decedent had a pre-emption right to certain land. His adminis-

trator obtained from the land-office, upon payment of the purchase money, a certificate of entry for the land in the decedent's name. About a year afterwards the register of the land-office, being instructed by the commissioner of the general land-office at Washington that the certificate was improperly issued, issued another certificate of entry in the name of "the heirs of Milton B. Hamilton;" and a patent afterwards issued to them. After the issuance of this second certificate, the orphans' court, upon petition by the administrator, ordered a sale of this land for the payment of the decedent's debts. The land was sold, and the complainant became the purchaser. He alleged in his bill that at the time of the sale he was totally ignorant that there was any defect in the title to the land, or that the title did not pass by the sale; that the first certificate had been improperly issued, and that a second one had issued; and remained thus ignorant until after the execution of his note for the purchase money. He made a cash payment, and gave his note for the balance. The sale had been confirmed, though no deed had been executed. The administrator had recovered judgment upon the note. The bill offered to account for the rents and profits of the land while in the complainant's possession, and prayed that the purchase money paid might be refunded, and that the judgment might be enjoined. The bill was dismissed for want of equity, and the complainant appealed.

M. J. Turnley, for the appellant.

Alexander White, contra.

By Court, RICE, C. J. The rule *caveat emptor* applies to sales of land under the order of the probate or orphans' court. A purchaser at such a sale buys at his peril. Although he may pay the purchase money and get no title, yet if he obtained no warranty, and if at the time of the sale there was no fraud, and no mistake or ignorance of any material fact, he has no right to relief in a court of equity. He cannot found a right to relief on his mere ignorance or mistake of law: *Haden v. Ware*, 15 Ala. 149.

Tested by these principles, the complainant's bill shows no right in him to relief. True, he alleges that at the time of the sale, and up to a period subsequent to February, 1845, and to the execution of the note for the residue of the purchase money, he was "ignorant that there was any defect in the title to said land, or that the title to the same did not pass by the said sale," or that "the first certificate had been improperly issued, and

that a second one had issued. But construing these allegations most strongly against him, as it is our duty to do, we are bound to take them as allegations of his mere ignorance of the legal effect of the known facts. He does not pretend in his bill that he was ignorant of any of the following facts: that the intestate, at the time of his death, had nothing but a pre-emption right; that no entry of the land had been made at his death; that after his death the pre-emption right was established by his administrators and the land entered by virtue thereof. These facts being known to the complainant at the time he purchased at the sale made under the order of the orphans' court, it was immaterial whether he knew in whose name either of the certificates had issued; for no matter in whose name they issued, the sale of the land as the real estate of the intestate, under the order of the orphans' court, could not pass any title to the purchaser, for the reason that at the time of his death the intestate had no title, either legal or equitable, to the land, and no such interest therein as could be sold by order of any court: *Johnson v. Collins*, 12 Ala. 822; *Pettit v. Pettit*, 32 Id. 288; *Cothran v. McCoy*, 33 Id. 65. And if with a knowledge of these facts the complainant purchased at the sale under the order of the orphans' court, without fraud, and without any warranty, he has no right to call upon a court of equity to relieve him: *Jennings v. Jenkins's Adm'rs*, 9 Id. 285; *Worthington v. McRoberts*, Id. 297; *Pool v. Hodnett*, 18 Id. 752; *Ricks v. Dillahunty*, 8 Port. 133.

The decree of the chancellor is affirmed, at the costs of the appellant.

WHEN PURCHASER AT EXECUTION OR JUDICIAL SALE MAY OBTAIN RELEASE FROM HIS BID.—CAVEAT EMPTOR is the rule of all execution sales, and judicial sales at law or in equity. Each bid is considered as made for such title as the defendant, ward, decedent, or other person whose property is sold may have. And therefore the bid is binding whether such person had any title or not: *Freeman on Executions*, sec. 301; *Freeman on Cotenancy and Partition*, sec. 547; *Freeman on Void Judicial Sales*, sec. 46; *Webster v. Haworth*, 68 Am. Dec. 287, and cases cited in the note 290; *Ricks v. Dillahunty*, 8 Port. 134 (probate); *Worthington v. McRoberts*, 9 Ala. 297 (probate); *Jennings v. Jenkins's Adm'rs*, Id. 291 (probate); *McCartney v. King*, 25 Id. 681 (execution); *Owen v. Slatter*, 29 Id. 547; S. C., 62 Am. Dec. 745 (probate); *Smith v. Perry*, 56 Ala. 266 (bankruptcy); *Fore v. McKennie*, 58 Id. 115 (probate); *Black v. Walton*, 32 Ark. 321 (guardian); *Halleck v. Guy*, 9 Cal. 181 (probate); *Boggs v. Hargrave*, 16 Id. 559 (foreclosure); *Byrd v. Turpin*, 62 Ga. 591 (guardian); *Colbert v. Moore*, 64 Id. 502 (probate); *Jones v. Warnock*, 67 Id. 484 (probate); *England v. Clark*, 4 Scam. 486 (execution); *McManus v. Keith*, 49 Ill. 388 (partition); *Bassett v. Lockard*, 60 Ill. 164 (partition); *Holmes v. Shaver*, 78 Id. 678 (execution); *Tilley v. Bridges*, 106 Id. 336 (probate); *Bridges v. Tilley*, 11 Ill. App. 353

(probate); *Loudon v. Robertson*, 5 Blackf. 276 (probate); *Dunn v. Frazier*, 8 Id. 432 (execution); *Rodgers v. Smith*, 2 Ind. 526 (execution); *Dean v. Morris*, 4 G. Greene, 312 (execution); *Downard v. Crenshaw*, 49 Iowa, 296 (execution); *Farmers' Bank v. Peter*, 13 Bush, 591 (foreclosure); *Headrick v. Yount*, 22 Kan. 344 (probate); *Anderson v. Foulke*, 2 Har. & G. 346 (equity); *Farmers' etc. Bank v. Martin*, 7 Md. 342; S. C., 61 Am. Dec. 350, note 353 (chancery); *Barron v. Mullin*, 21 Minn. 374 (receiver); *Hand v. Grant*, 10 Smed. & M. 514 (execution); *Millen v. Boarman*, 13 Id. 100 (probate); *Cogan v. Frisby*, 36 Miss. 185 (probate); *Short v. Porter*, 44 Id. 533; *Hensley v. Baker*, 10 Mo. 157 (execution); *Islay v. Stewart*, 4 Dev. & B. L. 160 (execution); *Richardson v. Vicker*, 74 N. C. 278; (execution) *Steadman v. Taylor*, 77 Id. 134 (bankruptcy); *Rollins v. Henry*, 78 N. C. 342 (execution); *Freeman v. Caldwell*, 10 Watts, 9 (execution); *Miller v. Fitch*, 7 Watts & S. 366, 367; *Sackett v. Twining*, 18 Pa. St. 199; S. C., 57 Am. Dec. 599 (probate); *Moore v. Akin*, 2 Hill (S. C.), 403 (execution); *Evans v. Dendy*, 2 Speers, 9 (partition); *Hously v. Lindsay*, 10 Heisk. 651 (chancery); *Thompson v. Munger*, 15 Tex. 523; S. C., 65 Am. Dec. 176 (probate); *Hoge v. Currin*, 3 Gratt. 201 (tax sale); *Hickson v. Rucker*, 77 Va. 135 (chancery); *Capehart v. Dowery*, 10 W. Va. 130 (chancery); *Osterberg v. Union Trust Co.*, 93 U. S. 424 (foreclosure); *The Monte Allegre*, 9 Wheat. 616 (admiralty). Where there has been fraud, accident, or mistake, or other ground for equitable relief, a court of equity will relieve the purchaser: *Infra*. But otherwise *caveat emptor* applies to all judicial sales; and a defect of title or unsoundness will not avail the purchaser: See cases *supra*. Cases have been cited above which hold that the rule of *caveat emptor* applies to sales in equity. But the weight of authority makes a great difference between the application of this rule to equity sales and its application to other judicial sales, especially where the purchaser objects that there is a defect in the title unknown to him at the time of his purchase; and some of the cases virtually abolish the rule altogether when this objection is urged upon sales in equity. This subject is discussed *infra*.

No Warranty at Judicial Sales.—There is no warranty of title or soundness at a judicial sale, and therefore, in the absence of fraud, no defense can be made on this ground: *Ricks v. Dillahunty*, 8 Port. 134 (probate); *Atwood v. Wright*, 29 Ala. 346 (probate); *Colbert v. Moore*, 64 Ga. 502 (probate); *Jones v. Warnock*, 67 Id. 484 (probate); *Bussell v. Lockard*, 60 Ill. 164 (partition); *Holmes v. Shaver*, 78 Id. 578 (execution); *Tilley v. Bridges*, 105 Id. 336 (probate); *Rodgers v. Smith*, 2 Ind. 526 (execution); *Millen v. Boarman*, 13 Smed. & M. 100 (probate); *Short v. Porter*, 44 Miss. 533 (probate); *Hensley v. Baker*, 10 Mo. 157 (execution); *Freeman v. Caldwell*, 10 Watts, 9 (execution); *Miller v. Fitch*, 7 Watts & S. 366, 367; *Evans v. Dendy*, 2 Speers, 9 (partition); *Hously v. Lindsay*, 10 Heisk. 651 (chancery); *Hoge v. Currin*, 3 Gratt. 201 (tax sale); *The Monte Allegre*, 9 Wheat. 616 (admiralty). In South Carolina, however, the unsoundness of a negro at the time of the sale of the negro for the purpose of partition has been held to be a good defense for the purchaser on the ground of a failure of consideration, though not on the ground of a breach of warranty: *Commissioner v. Smith*, 9 Rich. L. 516. But where the commissioner at a partition sale gives notice that there is no warranty of soundness, the rule *caveat emptor* applies, and unsoundness will be no defense: *Parker v. Partlow*, 12 Id. 679.

Defect of Title No Defense.—(But see "Equity Sales," *infra*.) In sales in equity, as we shall see, a defect in the title is often a means whereby the purchaser may avoid the payment of his bid. But ordinarily, as there is no warranty in judicial sales and the rule of *caveat emptor* applies in the absence of

any substantial particular, the purchaser is not bound if he had no prior notice of the incumbrance or equity affecting the title, and the sale was made without reservation or notice of a defect in title: *Edney v. Edney*, 80 N. C. 81; *Rogers v. McLean*, 10 Abb. Pr. 306; *Seaman v. Hicks*, 8 Paige, 655; *People v. Knickerbocker Life Ins. Co.*, 66 How. Pr. 115; *Fryer v. Rockefeller*, 63 N. Y. 268. Especially where the sale stipulates for a title free from incumbrances: *Matter of Whitlock*, 32 Barb. 48; S. C., 10 Abb. Pr. 316; 19 How. Pr. 380. But where a purchaser at a sale in equity purchases with knowledge of a defect in the title, this defect will not justify him in refusing to complete his purchase: *Fryer v. Rockefeller*, 63 N. Y. 268 (foreclosure); *Young v. McClung*, 9 Gratt. 336; *Riggs v. Parrell*, 66 N. Y. 193 (foreclosure); *Jewett v. Miller*, 10 Id. 402; *Ledyard v. Phillips*, 32 Mich. 13; *Farmers' etc. Bank v. Martin*, 3 Md. Ch. 224 (equity); *Strong v. Waddell*, 56 Ala. 471. A defect in the title is no defense where the purchaser has been negligent in ascertaining the facts concerning the property: *Hays v. Stiger*, 29 N. J. Eq. 196. Where a mortgage is of a leasehold interest, and in the notice of sale under judgment of foreclosure the lease is referred to, a purchaser is chargeable with knowledge of the contents of the lease, and is supposed to have made his bid in view of its provisions: *Riggs v. Parrell*, 66 N. Y. 193. A purchaser at a foreclosure sale who has full notice of the fact that the mortgagor has only a leasehold interest cannot take advantage of the fact that the decree directs a sale of the fee: *Graham v. Bleakie*, 2 Daly, 55. If a junior mortgage has been duly recorded, a purchaser of the mortgaged premises upon a foreclosure of a senior mortgage will be presumed to have purchased with reference to the junior mortgage, and a purchaser from him is also affected in the same way: *McKernan v. Neff*, 43 Ind. 503. Chancery will not relieve a purchaser with notice of a vendor's lien on the land simply because of his mistaken belief that the estate was solvent and able to discharge the lien: *Morencastle v. Moor*, 11 Helsk. 481. A purchaser at a foreclosure sale knowing of an adverse claim to the property, the strength of which he cannot determine until the same has been judicially determined, may buy in the rival claim and deduct for it, or if the money has been paid into court, demand the return of a proportional part of it: *Kithridge v. Vernoy*, 80 N. C. 78.

For What Defects in Title Relief will be Granted.—The purchaser is not bound to accept an equitable or doubtful title, but the title must be good both at law and in equity: *Morris v. Mowatt*, 2 Paige, 586; *Abel v. Houthcote*, 2 Ves. jun. 100. The title should be good to a moral certainty: *Monaghan v. Small*, 6 S. C. 177. A reasonable doubt as to the sufficiency of the title is sufficient: *Matter of Cavanaugh*, 14 Abb. Pr. 258 (partition). The purchaser cannot be compelled to receive a good legal title if it is liable to be litigated in consequence of some valid equitable claim against it: *Morris v. Mowatt*, 2 Paige, 586; *Jordan v. Poillon*, 77 N. Y. 518. A purchaser will not be compelled to take title where a person who, if living, would have an interest in the property, is not proved to be dead, merely because such person has been absent and unheard from for seven years, for the presumption of death is not sufficient basis for the title: *McDermot v. McDermot*, 3 Abb. Pr., N. S., 451. An outstanding inchoate right of dower will excuse the purchaser from the completion of his purchase: *People v. Knickerbocker Life Ins. Co.*, 66 How. Pr. 115 (foreclosure); or the fact that the judgment does not bar future contingent interests in the property: *Monarque v. Monarque*, 60 N. Y. 320; S. C., 3 Abb. N. C. 102. If a city has a right to take the land for a street without paying for the buildings thereon, and the purchaser was ignorant of this at the time of sale, he will not be compelled to complete his purchase though the

probability of the exercise of this right is very remote: *Seaman v. Hicks*, 8 Paige, 655. Where it was represented that the property was free from incumbrances, and after the sale and the report it was discovered that it was subject to a lien for taxes, the court ordered the incumbrances to be discharged out of the proceeds of the sale, upon the purchaser's refusal to complete the purchase otherwise: *Lawrence v. Cornell*, 4 Johns. Ch. 542. Though under the rule of *caveat emptor*, he must assume the payment of tax liens: *Guntton v. Zantsinger*, 3 McArthur, 262; and cannot retain the amount thereof out of his bid: *Osterburg v. Union Trust Co.*, 93 U. S. 424. He is not bound to take an affidavit of the administrator or any other person that there are no liens on the property, but he is entitled to have that fact made out beyond a reasonable doubt: *Hall v. Partridge*, 10 How. Pr. 188.

On the other hand, the equities should be clear and strong to give the purchaser relief, and to induce a setting aside of the sale: *Ledyard v. Phillips*, 32 Mich. 13 (foreclosure). The purchaser is entitled to such title only as the purchaser of the premises at a private sale would be entitled to receive from his vendor: *Spring v. Sandford*, 7 Paige, 550. Immaterial defects and merely technical objections will not defeat the sale. The court will not permit the purchaser to avoid his contract without seeing that the object of the purchase is defeated and that it would be injurious to him to enforce the contract. If he gets substantially what he contracted for, he must complete the purchase: *Riggs v. Purcell*, 66 N. Y. 193. He is bound to complete purchase where *prima facie* title is offered against which there is no reasonable ground of suspicion: *Matter of Browning*, 2 Paige, 64. Where the incumbrance is such that it could not have affected the amount of the bid, the purchaser is not released: *Riggs v. Purcell*, 66 N. Y. 193. The purchaser cannot object that there is a possibility that some person other than the parties to the suit has an interest in the premises, where there is no probability that such an interest exists: *Dunham v. Minard*, 4 Paige, 441. Where he will obtain a valid title, where infant heirs have been effectually barred, he will be compelled to complete the purchase: *Daniel v. Leitch*, 13 Gratt. 195. Where, pending a bill for an injunction of the enforcement of a judgment, and for the rescission of the contract of purchase on the ground of a defective title, the incumbrance is removed, the injunction is properly dissolved: *Young v. McClung*, 9 Id. 336, and see *infra*, "Granting Time for Examining or Curing Defects." The fact that there is a suit pending between parties to the foreclosure suit to set aside the mortgage is no ground for discharging the purchaser at the foreclosure sale, for by the sheriff's deed he obtains all the title of all the parties to the suit: *Holden v. Sackett*, 12 Abb. Pr. 473. The fact that an appeal is pending from an order denying a motion to set aside the judgment is not ground for discharging the purchaser, for he obtains a good title though the judgment be set aside for an error or irregularity: *Id.* The subsequent commencement of bankruptcy proceedings does not affect the jurisdiction of the court in a proceeding of foreclosure: *Leinhan v. Hamann*, 14 Abb. Pr., N. S., 274. A purchaser at a foreclosure sale of leasehold premises is not to be discharged because of arrears of ground-rent, but the sheriff should pay this out of the purchase money: *Holden v. Sackett*, 12 Abb. Pr. 433.

Defect in Parties.—Since in these sales in equity the purchaser is entitled to the whole title, and the interests of persons not before the court are not barred by the decree, the purchaser will not be compelled to take title when interested persons are not made parties to the suit or when they are not properly before the court through improper service of process and the like:

Verdin v. Slocum, 71 N. Y. 345; *Cook v. Farnam*, 21 How. Pr. 286; d. C., 34 Barb. 95; S. C., 12 Abb. Pr. 359; *Kohler v. Kohler*, 2 Edw. Ch. 69; *Rogers v. McLean*, 31 Barb. 304; S. C., 10 Abb. Pr. 306; *Clark v. Clark*, 14 Id. 300; *Alvord v. Beach*, 5 Id. 451; *Darwin v. Hatfield*, 4 Sandf. 468; *Goode v. Crow*, 51 Mo. 212, 215; *Dodd v. Neilson*, 90 N. Y. 243; *Spring v. Sandford*, 7 Paige, 550. A purchaser at a foreclosure sale, void because the grantee of the mortgagor was not made a party, cannot obtain relief by means of an action at law to recover from the mortgagees the purchase money paid, where he was aware of the fact that the mortgagor had sold the premises and there was no fraud. His relief must be sought by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the court, and upon his application the court may direct the sale to be set aside and the satisfaction to be canceled, and may authorize a supplemental bill for a resale of the premises to be filed and conducted in the names of the complainants in that suit for the plaintiff's benefit, all interested persons being made parties, or it may make such other order as will bring about substantial justice: *Boggs v. Harygrave*, 16 Cal. 566, per Field, J.; *Burton v. Lies*, 21 Id. 87; see *Alexander v. Greenwood*, 24 Id. 505. A purchaser under a foreclosure of a junior mortgage, where the senior mortgagee was not a party, may on petition have the sale and purchase set aside since the legal title did not pass to the purchaser: *Shiveley v. Jones*, 6 B. Mon. 274. A purchaser under a sale upon a senior mortgage may assail a junior mortgage for fraud: Id. The sale will not be enforced where a prior mortgagee was not made a party and the bid was greatly in excess of the equity of redemption purchased, although the prior mortgage was recorded and there was no fraud, but the plaintiff will be relegated to his remedy at law against the purchaser: *Twining v. Neil*, 38 N. J. Eq. 470. A purchaser of leasehold interest at foreclosure sale will be released when there are tenants in possession who were not made parties to the action, since they could not be dispossessed by any process which could be issued to enforce the judgment: *Hirsch v. Livingston*, 3 Hun, 9; S. C., 48 How. Pr. 243. A sale by a probate court, void because heirs are not made parties, conveys no title, and the purchaser may set up the failure of consideration in bar of recovery of the purchase money: *Campbell v. Brown*, 6 How. (Miss.) 230.

When irregularities concerning parties are cured or not prejudicial, the purchaser cannot object: *Rogers v. McLean*, 31 How. Pr. 279; S. C., 34 N. Y. 536; S. C., 10 Abb. Pr. 306 (guardian). Where the necessary parties were in fact joined, and this sufficiently appears from the record though some of the papers have been lost, the purchaser will be compelled to take title; and so, where the advertisement was published the required length of time though directed to be published a less time: *Alvord v. Beach*, 5 Id. 451. In New York a partition sale under decree bars the future contingent interests of persons not in esse, though no notice is published to bring in unknown parties, and therefore a purchaser cannot avoid his purchase on this ground: *Mead v. Mitchell*, 17 N. Y. 210. On a sale in partition the purchaser, not a tenant in common at the commencement of the proceedings, cannot object to the validity of the sale on the ground that he was not a party to the proceeding, where he took a deed of a portion of the premises *pendente lite* from some of the parties to the partition suit: *Noble v. Cromwell*, 27 How. Pr. 289; S. C., 26 Barb. 475; S. C., 6 Abb. Pr. 59.

Defect in Title Cured.—We have seen *supra* that when a defect in the parties is cured the purchaser cannot object. So when the defect in the title is cured, the plaintiff is likewise without valid cause of objection and is bound

to complete his purchase. Where an offer is made to effectually cure a defect in title, the purchaser cannot object to complete his purchase: *Graham v. Bleakie*, 2 Daly, 55. Where an inchoate right of dower is quitclaimed to the purchaser, he cannot object to the title: *Merchants' Bank v. Thompson*, 55 N. Y. 7. The sale having been confirmed, even if the proceeding was irregular as to the infant heirs, yet the purchaser will not be discharged from his purchase if the title can be perfected within a reasonable time; and the guardian of the infants having filed his bill according to the statute in which he asks to have the sale confirmed as very beneficial to the infants, the court may in that case confirm the sale, and thus assure to the purchaser a good title against the infant heirs and compel him to complete his purchase: *Daniel v. Leitch*, 13 Gratt. 195.

Granting Time for Examining or Curing Defects in Title.—Upon an order requiring a purchaser to show cause why he should not complete his purchase, he may apply to the court for an order of reference to ascertain if title can be made, and if it appears from the referee's report that the title is irremediably bad or of doubtful validity, the court will not compel him to complete the purchase: *Graham v. Bleakie*, 2 Daly, 55; *Thomas v. Davidson*, 76 Va. 338. A defective title is no ground for discharging the purchaser if capable of being made good within a reasonable time: *Coffin v. Cooper*, 14 Ves. 205. Courts of equity have at least as large a discretion in giving time to perfect the title in cases of sales under their decrees as in cases of purchases by private contract: *Daniel v. Leitch*, 13 Gratt. 195; *Thomas v. Davidson*, 76 Va. 338, 342. The court should and will allow a reasonable time to remedy a defect in the title: *Id.*; *Ormsby v. Terry*, 6 Bush, 553.

AFTER CONFIRMATION, OBJECTION OF DEFECT IN TITLE COMES TOO LATE. This is the rule in several states. For after confirmation a complete contract has been made between the court and the purchaser: *Thomas v. Davidson*, 76 Va. 344. By his purchase the purchaser becomes a party, with respect to all questions concerning the sale and his purchase, and is bound by the decree of confirmation equally with the other parties: *Hickson v. Rucker*, 77 Id. 135; therefore he must object to irregularities in the sale and to defects in title before confirmation or he will be without relief, in the absence of fraud, accident, or mistake: *Thomas v. Davidson*, 76 Id. 344; *Hickson v. Rucker*, 77 Id. 135; *Long v. Weller*, 29 Gratt. 347; *Watson v. Hoy*, 28 Id. 698; *Threlkelds v. Campbell*, 2 Id. 198; S. C., 44 Am. Dec. 384; *Caphart v. Dowery*, 10 W. Va. 130; *Farmers' Bank v. Peter*, 13 Bush, 591; *Worthington v. McRoberts*, 9 Ala. 297, 300; *Perkins v. Winter*, 7 Id. 871; therefore, where this rule prevails, *caveat emptor* applies to these sales after confirmation: *Caphart v. Dowery*, 10 W. Va. 130; *Boyce v. Strother*, 76 Va. 862; *Farmers' Bank v. Peter*, 13 Bush, 591. Certainly, after confirmation he cannot set up facts known to him before confirmation: *Headrick v. Yount*, 22 Kan. 344 (probate); *Spence v. Armour*, 9 Heisk. 167; *Boyce v. Strother*, 76 Va. 862. His relief is to be obtained by resisting the confirmation of the sale; a court of equity will not enjoin a judgment for the purchase money: *Threlkelds v. Campbell*, 2 Gratt. 198; S. C., 44 Am. Dec. 384. After a sale of infants' lands has been confirmed by the court, although the proceeding has been irregular, yet if the title of the purchaser can be made good, and it is for the interest of the infants to confirm the sale, the purchaser will not be released from his purchase; but if the interest of the infants is injured by the sale, it will be set aside: *Daniel v. Leitch*, 13 Gratt. 195; and an application before confirmation by a purchaser to have a sale set aside on the ground that there was a prior incumbrance on the property, and that he had purchased under a mistake, will be granted: *Hunting v. Walter*, 33 Md. 60; *Farmers' Bank v. Peter*, 13 Bush. 591.

But even after confirmation the purchaser may obtain relief on the ground of after-discovered fraud, or a mutual mistake of himself and the vendor: *Long v. Weller*, 29 Gratt. 347; *Watson v. Hoy*, 28 Id. 698; *Thomas v. Davidson*, 76 Va. 338; *Hickson v. Rucker*, 77 Id. 135; see "Fraud" and "Mistake," *infra*.

Terms of Sale.—In New York it is often provided by the terms of the sale that the referee shall pay off out of the purchase-money liens outstanding against the property, and in such a sale it is reasonable and proper to impose upon the purchaser the burden of producing to the referee proof of such liens and vouchers for the payment thereof, and this provision excuses the referee from the duty of making an examination for liens, but a referee having a knowledge of liens cannot disregard them, but must pay them out of the purchase money though the purchaser fail to produce proof and vouchers of payment: *Easton v. Pickersgill*, 55 N. Y. 310; *Weseman v. Wingrove*, 85 Id. 353; *Post v. Leet*, 8 Paige, 337. There is no rule that requires the referee in his report of title on proceedings on partition to annex to his report a search for instruments affecting the title. If his report states the fact explicitly that he had caused the necessary searches to be made, and certifies what incumbrances, etc., there are, it is sufficient: *Noble v. Cromwell*, 27 How. Pr. 289; S. C., 26 Barb. 475; S. C., 6 Abb. Pr. 59. Where the terms of the sale provide that existing incumbrances will be allowed to the purchaser out of the purchase money on his producing vouchers therefor, the existence of incumbrances which he might have thus paid off is no reason for refusing to fulfill his purchase: *Lenihan v. Hamann*, 14 Abb. Pr., N. S., 274. It is not necessary that the referee advertise for liens, unless the court so advise, or it is required by some party to the suit: *Noble v. Cromwell*, 27 How. Pr. 289; S. C., 26 Barb. 475; S. C., 6 Abb. Pr. 59. But such advertisement, if made, will bar creditors: *Dunham v. Minard*, 4 Paige, 441.

In Maryland the burden of proof is upon the purchaser at a chancery sale to show that he made the purchase free from all incumbrances: *Farmers' & Planters' Bank v. Martin*, 7 Md. 342; S. C., 61 Am. Dec. 350. For a defect of title the purchaser may be relieved from his purchase by asking a rescission of the sale at the proper time, but he cannot hold on to the property and insist upon having the proceeds of the sale applied to the extinguishment of the claims of incumbrancers not parties to the suit: *Duvall v. Speed*, 1 Md. Ch. Dec. 235.

VOID SALE, PURCHASER NOT BOUND BY.—The purchaser at a judicial sale is always entitled to such interest as the defendant actually has, and if from any defect in the proceedings a sale is so void that it cannot transfer the interest of the defendant, then the purchaser is not bound by his bid, but may successfully resist any action seeking its enforcement: *Thrift v. Fritz*, 7 Ill. App. 55 (foreclosure), citing *Freeman on Executions*, sec. 301; see *Freeman on Void Judicial Sales*, sec. 46; *Dawley v. Brown*, 65 Barb. 107. The purchaser may refuse to complete his purchase because the court had no jurisdiction of the parties or the subject-matter, or because some statutory provision has been violated, or some irregularity has intervened, which makes the proceeding invalid: *Darwin v. Hatfield*, 4 Sandf. 468 (equity); *Boyd v. Cook*, 61 Ala. 472 (execution); *Burns v. Ledbetter*, 56 Tex. 282 (execution); *Bartee v. Tompkins*, 4 Sneed, 623 (chancery); *Henry v. Keys*, 5 Id. 488 (execution); *Stoney v. Schultz*, 1 Hill Ch. 465 (foreclosure); *Commissioner v. Smith*, 10 Watts, 392 (tax sale); *Short v. Porter*, 44 Miss. 533 (probate); see *Henderson v. Overton*, 24 Am. Dec. 492; *Campbell v. Brown*, 6 How. (Miss.) 230. A purchaser will not be compelled to take title when, from want of proof of a material fact, it appears that the decree of sale is liable to be impeached at

some future time: *Earle v. Twrten*, 26 Md. 23, 34 (partition). If a sale takes place under three executions, and either of the judgments on which they issued bind the property of the defendant, it is sufficient to pass his interest to the purchaser, though neither of the other judgments bind the property: *Hand v. Grant*, 10 Smed. & M. 514. The right of redemption of a judgment debtor is not subject to be sold under another execution; and when it is so sold, and satisfaction entered, it is the duty of the court to vacate the entry of satisfaction and to issue another execution: *Watson v. Reissig*, 24 Ill. 281; see *Mason v. Thomas*, Id. 285. A plaintiff who levies on land of a testator upon a judgment against the executor in his representative capacity does not satisfy his debt though he bids the full amount thereof at the sale and receives a deed, for the sale is void: *Boykin v. Cook*, 61 Ala. 472. The purchaser may show, in defense to an action on the purchase-money note, that the sale was void, not being in compliance with the statute, and thus establish a failure of consideration of the note: *Laughman v. Thompson*, 6 Smed. & M. 259 (probate); *Riddle v. Hill*, 51 Ala. 224, citing *Skelheimer v. Chapman*, 32 Id. 678; *Beene v. Collenberger*, 38 Id. 647 (probate). The purchaser of a chattel at a judicial sale must first return the chattel and rescind the contract of sale before defending on the ground that the sale was void: *Martin v. Turner*, 43 Miss. 517; *Jagers v. Griffin*, Id. 134. The offer to rescind must be accompanied by a tender of the property, and must be made in due time: *Jagers v. Griffin*, *supra*. The fact that the slave purchased ran away from the purchaser and was emancipated by the United States, which prevented an offer to return the slave and rescind the bargain, is no defense: Id. The purchaser at an invalid sale of real estate is not bound to offer to surrender the possession thus acquired in order to entitle him to resist the collection of the purchase money. *Aliter* as to the purchaser of personalty, for the administrator must account therefor: *Washington v. McCaughan*, 34 Miss. 304. Upon rule to show cause why the purchase money be not paid, the purchaser may show that the sale was void, and should thereupon be discharged: *Barrett v. Churchill*, 18 B. Mon. 387 (equity). When the court has no jurisdiction to decree a sale, a purchaser may urge this as an objection to the ratification of the sale: *Fox v. Reynolds*, 50 Md. 564. An irregularity rendering the sale invalid is ground for relief in equity from the purchase: *Tolley v. Starke*, 8 Gratt. 339; *Bartee v. Tompkins*, 4 Sneed, 623; *Henry v. Keys*, 5 Id. 488. Rights of purchasers who, by reason of void sales, have paid off claims on real estate: Note to *Scott v. Dunn*, 30 Am. Dec. 177-182.

IRREGULARITIES AS GROUND OF RELIEF.—A purchaser will not be relieved from the payment of his bid because of an irregularity which cannot injure him or which may be amended: *Crogan v. Livingston*, 17 N. Y. 218 (partition); *Knight v. Moloney*, 4 Hun, 33; *Waring v. Waring*, 7 Abb. Pr. 472; *Darwin v. Hatfield*, 4 Sandf. 468; *Capehart v. Dowery*, 10 W. Va. 130. A purchaser cannot object for irregularities corrected by an order *nunc pro tunc*, and which do not affect the jurisdiction of the court: *Bogert v. Bogert*, 45 Barb. 121. Where the court has jurisdiction of the parties and subject-matter, the purchaser takes the mortgagor's title, though the judgment be afterwards reversed for irregularities: *Graham v. Bleakie*, 2 Daly, 55.

Whether the irregularity is injurious or not, if it does not invalidate the sale the purchaser cannot urge it after the confirmation of the sale, but must take advantage of the irregularity by objecting to the confirmation: *Worthington v. McRoberts*, 9 Ala. 297, 300; *Perkins v. Winter*, 7 Id. 871; *Jennings v. Graham*, 9 Ala. 285, 289; *Cargile v. Ragan*, 65 Ala. 287; *Otis's Estate*, Myrick's Probate, 222; *Todd v. Dowd*, 1 Meta. (Ky.) 281; *Thomas v. Davidson*,

70 Va. 344; *Langyher v. Patterson*, 77 Id. 470; *Worsham v. Hardaway*, 5 Gratt. 60 (error in decree); *Dick v. Robinson*, 19 W. Va. 159 (error in decree). Where the purchaser prevents a confirmation of the sale and obtains an extension of time for the payment of the purchase money, he is estopped from afterwards raising the question of the payment of the purchase money as required by the terms of the decree: *Haralson v. George*, 58 Ala. 295. A purchaser who fails to move to set aside the sale cannot, in an action for the difference between his bid and the amount obtained at a resale, set up an error in the levy describing the lands as situated in the wrong township: *Cooper v. Borrall*, 10 Pa. St. 491. Nor can he object to deed because it states a smaller consideration than the nominal bid, pursuant to an agreement that the amount of any incumbrance upon the property should be deducted from the face of the nominal bid: *Stebbins v. Field*, 43 Mich. 333. A purchaser in possession cannot abandon possession and refuse to pay the purchase money for an irregularity in the sale: *Worthington v. McRoberts*, 9 Ala. 297. A purchaser in possession cannot disaffirm sale on account of an irregularity when the heir is willing to confirm it: *Jennings v. Jenkins's Adm'rs*, 9 Ala. 285, 290.

FRAUD AND MISREPRESENTATIONS AS GROUND OF RELIEF.—The purchaser may have the sale set aside when there is any injurious mistake, misrepresentation, or fraud, and the property will be resold: *Anderson v. Foulke*, 2 Har. & G. 346; *Fisher v. Hersey*, 17 Hun, 370; *Hayes v. Stiger*, 29 N. J. Eq. 196; even after confirmation: *Hickson v. Rucker*, 77 Va. 135. He may have sale set aside because of the employment of puffers at the sale, who induced the purchaser to offer a higher price than he would otherwise have offered: *Fisher v. Hersey*, 17 Hun, 370. But a purchaser at an administrator's sale of land cannot defeat a recovery on purchase-money notes, or rescind, because a person interested in the estate, but with whom the administrator had no connection, employed a puffer at the sale, and therefore the purchaser bid more than the value of the land: *East v. Wood*, 62 Ala. 313. In *Pore v. McKenzie*, 58 Ala. 115, it is held that fraud in a judicial sale is no defense to an action on the purchaser's notes; but he can take advantage of it only by bill in equity, making interested parties defendants. A purchaser at an execution sale is protected from the payment of his bid when he was induced to purchase through the misrepresentations of the judgment creditor that his judgment was the first lien on the property, whether these representations were willfully or ignorantly made; and the fact that he might have ascertained the falsity of the representations by an examination of the public records will make no difference for the judgment creditor from claiming any advantage resulting from his own misrepresentations. For the rule of *caveat emptor*, as applied to judicial sales, may be overcome by evidence of fraud, or that the purchaser did not know the condition of the thing purchased and was induced to buy through misrepresentations of those who, from their peculiar relations to the subject, were supposed to be thoroughly acquainted with it. An execution creditor is such a person: *Webster v. Haworth*, 8 Cal. 21; S. C., 68 Am. Dec. 287; *Masson v. Bovet*, 1 Denio, 69; S. C., 43 Am. Dec. 651. When a purchaser under foreclosure of a junior mortgage, where the senior mortgagee is not made a party, is by false representations induced to believe that the proceeds of the sale will be applied to the payment of the prior mortgage, and that he would thereby take the title fully released therefrom, the court is justified in setting aside such sale: *Paulett v. Peabody*, 3 Neb. 196. If a referee irregularly sells property free from a lien which he promises to pay off out of the proceeds, instead of selling it subject to the

lien pursuant to the decree, the purchaser cannot be compelled to pay into court the amount of the lien in addition to the bid. For the injured parties the remedy is by an application for a resale: *Hotchkiss v. Clifton Air Cure*, 2 Abb. App. Dec. 406. If land is purchased upon the misrepresentations of the guardian as to the title, the purchaser will not be held at law or in equity, whether or not the guardian knew of the falsity of his representations: *Black v. Walton*, 32 Ark. 321. Where the plaintiff is present at the sale, he is bound by the representations of the sheriff that a vendor's lien will be paid out of the proceeds: *Bottoms v. Mithvin*, 26 Ga. 481; S. C., 71 Am. Dec. The master should insert nothing in the description of the property in the notice of sale which may unduly enhance its value or mislead the purchaser: *Veeder v. Fonda*, 3 Paige, 94. The purchaser must have relied upon the false representations: *Bond v. Ramsey*, 89 Ill. 29; and must act promptly upon the discovery of the fraud: *Masson v. Bovet*, 1 Denio, 69; S. C., 43 Am. Dec. 651; *Long v. Weller*, 29 Gratt. 347.

What does not Constitute Fraud or Misrepresentation.—Mere silence will not usually constitute fraud in a judicial sale. An administrator is not bound to disclose defects in title, and his mere silence does not amount to fraud which will vitiate the sale: *Thompson v. Munger*, 15 Tex. 523; S. C., 65 Am. Dec. 176. Fraud is not charged by averring that the sheriff and attorney of the judgment creditor knew of the defect in the title to the land sold: *Dean v. Morris*, 4 G. Greene, 312. But the purchaser may have the sale set aside when the land was described in the master's notice as containing about twenty acres, when in fact it contained but thirteen acres, and one of the complainants who was present at the sale knew of the deficiency, but concealed the fact from the master and the bidders, and encouraged them to bid: *Veeder v. Fonda*, 3 Paige, 94. The misrepresentations of the holder of the paramount title, between whom and the administrator who sells there exists no collusion, do not constitute fraud such as will relieve the purchaser who has been dispossessed by such person: *Pool v. Hodnett*, 18 Ala. 752. False and fraudulent representations made at a partition sale by one of the parceners or tenants in common will not affect his co-tenants, where he was not acting as their agent or representative, and such representations constitute no defense to an action for the purchase money, though perhaps the party making the representations might be liable: *Matlock v. Bigbee*, 34 Mo. 356. Where the estate of a decedent was insolvent as to general creditors, and the defendant upon the day of the sale of the decedent's land presented a claim against the estate of the administrator, and asked him how much land it would buy, to which he answered, after a hasty calculation, "Twenty-five hundred dollars, worth," in an action against the defendant and his sureties upon a note given for the purchase money of the land sold, where the defendant set up that he was induced to purchase through the administrator's agreement, that the claim might be applied *pro rata* in the payment for the land to the extent of twenty-five hundred dollars, it was held that the administrator's statement did not amount to an agreement to receive the claim in payment; that the defendant must show by the clearest proof his good faith in purchasing the claim; and that an understanding by the sureties that part of the purchase price was to be paid with the claim was no defense for them unless such understanding resulted from the acts or representations of the administrator: *Floyd v. Rust*, 58 Tex. 503.

In some states a distinction is made between an administrator's sale of realty and of personalty. It is held that the misrepresentations of an administrator respecting the title of land sold under order of court of probate

furnish no defense to the payment of the purchase money, for the administrator is the mere agent of the court, which is the real vendor, and there can be no warranty: *Fore v. McKenna*, 55 Ala. 115; *Ellis v. Kaylor*, 94 Ind. 308, citing *Redman v. Redman*, 84 Id. 444; *Hawkins v. Kimball*, 87 Id. 42; *Ross v. Oak*, 58 Id. 278. But even in such sales the officers or parties may bind themselves personally by their fraud or misrepresentations: *Ellis v. Kaylor*, 94 Ind. 308; *England v. Clark*, 4 Scam. 488; *Colbert v. Moore*, 64 Ga. 502. But in sales of personalty by an administrator, where the title is in him at the time of the sale, the rule is different. And misrepresentations of the soundness of personalty at an administrator's sale may constitute fraud which will be a good defense to an action on the purchase-money note: *Atwood v. Wright*, 29 Ala. 348; see *Miller v. Bowman*, 12 Smed. & M. 100.

MISTAKE AS GROUND FOR RELIEF.—A mistake of law is no ground for setting aside the sale; but it will be set aside for a mistake of fact which is not the result of the purchaser's own negligence. He must exercise due diligence to ascertain the facts: *Huges v. Stiger*, 29 N. J. Eq. 106 (foreclosure); *Updean v. Hamill*, 11 R. I. 565. A mere mistake of fact unaccompanied with fraud or the like is not ground for relief. And where there has been no fraud, misrepresentation, or concealment as to the quantity of the land sold, the court will not inquire whether there has been an actual mistake as to the quantity: *Feeder v. Fonda*, 3 Paige, 94; *Sackett v. Twining*, 18 Pa. St. 199; 21 C., 57 Am. Dec. 589; *Head v. Grant*, 10 Smed. & M. 514. But where land is sold as containing a given quantity of acres, and it appears that it contains less, a deduction will be made unless the deficiency is of such a nature that had it been known it would have prevented the purchase, for then the purchaser might have been relieved altogether: *Anderson v. Foulke*, 2 Har. & G. 346. After confirmation, however, the purchaser cannot raise this objection: *Id.*; *Borron v. Mullin*, 21 Minn. 374. But where the mistake is the quantity of the land sold has been mutual, it may be urged as a ground of relief even after confirmation: *Watson v. Hoy*, 28 Gratt. 696; see *Hickson v. Rucker*, 77 Va. 135; *Long v. Waller*, 29 Gratt. 347; *Thomas v. Davidson*, 78 Va. 338. Where a purchaser at a foreclosure sale agreed with one who had no authority to represent the plaintiff that only the excess of his bid over a claim held by him against the property should be required of him, and he purchased the property and afterwards sold it to a third person, it was held, in a proceeding to enforce his bid, that in order to avoid its payment he should have asked to have the bid set aside because of the mistake, and offered to place the parties in statu quo, or at least to account for the proceeds of the resale by him: *First National Bank v. Onger*, 37 Iowa, 474. A purchaser at an execution sale cannot in equity be relieved from completing his purchase because never having attended such a sale before, and not hearing the terms of the sale he supposed that he was buying the entire estate, and not merely the interest of the judgment debtor; for this is a mistake accompanied with gross negligence: *Updean v. Hamill*, 11 R. I. 565. The purchaser will be relieved, however, from the completion of his purchase, and his deposits will be restored, when it appears that the contract was one that he never intended to make, and was entered into without fault or negligence on his part; as where he was justified in believing that the lots purchased were corner lots when in fact they were not: *Feirchild v. Feirchild*, 89 Haw. Pr. 351. See *supra*, "Equity Sales—after Confirmation." The objection of fraud or mistake should be made as soon as discovered: *Long v. Waller*, 29 Gratt. 347.

STATEMENTS IN NOTICE OF SALE.—A purchaser at a private sale cannot refuse to pay the purchase money on the ground that the notice of sale stated

a good title, and that the title was not good. The sale was stated in the notice as a probate sale, the bidder knew its character and the effect of the deed, and is bound to examine the title for himself: *Halleck v. Guy*, 9 Cal. 181. The advertisement is not the contract of the parties: *Farmers' etc. Bank v. Martin*, 3 Md. Ch. 224. The master should insert nothing in the description of the property in the notice of sale which may unduly enhance its value or mislead the purchaser: *Feeder v. Bond*, 3 Paige, 94. And when the land is described in the notice as containing more acres than it actually contains, this is a ground of relief sometimes on the ground of fraud or mistake: See *supra*, "Fraud," and "Mistake." In *Hoge v. Currin*, 3 Gratt. 201, which was a sale of land for taxes, it was said that there was no warranty of the title or the description of the land sold. See *supra*, "Terms of Sale."

DESTRUCTION OF PROPERTY BEFORE COMPLETION OF SALE.—If intermediate a sale on a foreclosure and the time for the delivery of the deed to the purchaser the premises are materially damaged by fire or other cause, the loss must fall upon the owner of the equity of redemption and the mortgagee, and not upon the purchaser, for this latter does not become the owner until the delivery of the deed, and he need not complete the purchase; but if the injury is comparatively slight, and a full and adequate compensation for it is offered to the purchaser, he will not be relieved from his contract: *Aspinwall v. Balch*, 4 Abb. N. C. 193; S. C., 7 Daly, 200; *Mutual Life Ins. Co. v. Balch*, 4 Abb. N. C. 200. The test is whether the substantial inducement to the purchase has been destroyed: *Aspinwall v. Balch*, 7 Daly, 200. An offer to transfer to the purchaser a contract of insurance on the premises for an amount sufficient to cover the loss is not a good tender of compensation: *Id.* In *Vance v. Foster*, 9 Bush, 389, however, it was held that the purchaser was not released by the accidental loss or impairment of value of the property before the sale was confirmed or the actual possession changed; for it was said, as he would be entitled to the increase of value of the property, he should also suffer the loss.

DELAY IN COMPLETION OF SALE AS GROUND FOR RELIEF.—The purchaser will not be compelled to take title where by fault of the parties the completion of the sale has been delayed so long that he cannot have the benefit of his purchase substantially as if the sale had been completed at the time contemplated by the terms of the sale: *Jackson v. Edwards*, 7 Paige, 386, 412; S. C., 22 Wend. 498. But mere delay in the completion of the sale is not ground for relief. It must appear that some detriment has followed to the purchaser: *Merchants' Bank v. Thompson*, 55 N. Y. 7. In *Hyman v. Smith*, 13 W. Va. 744, however, it is held that the purchaser will be released where by acts of parties to the suit confirmation of the sale has been delayed for such an unreasonable time that it would probably cause loss to the purchaser. What is an unreasonable delay in confirmation must depend to some extent upon the circumstances of the case; and the court, in determining the question, must exercise a sound discretion in the interest of fairness, prudence, and the rights of all concerned. And in that case three years was held an unreasonable time, considering all the facts of the case: *Id.*

PAYMENT TO ONE NOT ENTITLED TO RECEIVE IT IS NO DEFENSE.—Where the purchaser pays the purchase money to commissioners appointed to sell land, who, by reason of their failure to execute the required bonds, or for other reason, have no authority to receive the purchase money, the purchaser is bound to pay the purchase money again; but the commissioners are liable to the purchaser for the amount so paid: *Tyler v. Toms*, 75 Va. 116; *Donabus v. Fackler*, 21 W. Va. 124.

MISCELLANEOUS QUESTIONS AFFECTING PURCHASER'S LIABILITY ON HIS CONTRACT.—A bidder at a sheriff's sale may withdraw his bid at any time before the property is struck off to him, and cannot be deprived of this right by any conditions prescribed by the sheriff: *Fisher v. Selzer*, 23 Pa. St. 306; 8 C., 62 Am. Dec. 335. But a bidder is not allowed to withdraw his bid proffered in pursuance to the statute in a partition sale of real estate: *Emerrick's Estate*, 11 Phila. 74. A purchaser at a sheriff's sale will not, even with the consent of the debtor, be relieved from his obligation to pay his bid, because the execution was afterwards technically satisfied by a levy on a sufficient amount of personalty to pay the judgment, but which was not actually applied for that purpose; the sale being regular at the time it was made, the right of the creditor to demand the amount which was bid cannot be defeated by any subsequent action of the sheriff, not being an actual payment to him of the judgment: *Jones v. Grant*, 34 Miss. 592. The judgment creditor may, if he desires, waive the payment of the bid: *Baudin v. Roliff*, 1 Mart., N. S., 165; S. C., 14 Am. Dec. 181. Where a resale is not made under the same terms as the first sale, the purchaser is not liable for the deficiency, and the court may discharge the first purchaser from his liability upon his purchase: *Riggs v. Pursell*, 74 N. Y. 370; see note "Remedies against Purchasers at Judicial Sales," *Mount v. Brown*, 69 Am. Dec. 365 et seq. A purchaser is entitled to rents from the day of the sale; and if they have been collected in advance, and this was not known to him, he will be entitled to a rebate upon his bid to an equal amount: *Winfrey v. Work*, 75 Mo. 55. The purchaser may insist upon the terms of his purchase, and need not pay cash when he bought on time: *Rhodes v. Dutcher*, 6 Hun, 453. When commissioners are authorized to sell land and execute their individual bonds, with condition to make title when the purchase money is paid, these bonds are collateral to the sale, and binding, if at all, upon the commissioners personally; therefore it is no defense to an action upon the purchase-money notes that upon tender of the money they refused to make title: *Jennings v. Jenkins's Adm'rs*, 9 Ala. 285. A debt due by a deceased person is not, under the Mississippi statute, an offset to a note given to the administrator for property purchased at his sale of the intestate's property: *Mellen v. Boardman*, 13 Smed. & M. 100.

REMEDIES AGAINST PURCHASERS AT JUDICIAL SALE.—This subject is discussed in the note to *Mount v. Brown*, 69 Am. Dec. 365 et seq.

WILSON v. CAMPBELL.

[38 ALABAMA, 249.]

EXECUTION REGULAR ON ITS FACE IS ADMISSIBLE TO SHOW TITLE in purchaser thereunder, though its validity is contested on the ground that the plaintiff therein was dead at the time of its issuance; for the death of the execution plaintiff is a fact for the determination of the jury.

PLAINTIFF IN EJECTMENT AGAINST PURCHASER AT EXECUTION SALE cannot introduce to impeach the execution a motion by the execution plaintiff, and the action of the court thereon, when he was neither a party nor privy to the execution.

RECORD IS NOT EVIDENCE OF FACTS RECITED, EXCEPT BETWEEN PARTIES OR PRIVIES.

SHERIFF'S DEED IS NOT INADMISSIBLE BECAUSE OF VARIANCE between the judgment and execution, and the recital thereof in the deed.

DEPOSITION IS NOT ADMISSIBLE AGAINST OBJECTION when it does not appear that the requisitions of the statute have been substantially complied with, as where the deponent died before signing it, or swearing to it.

ACTION to recover land. The plaintiff claimed title under a purchase from the trustee in a trust deed executed by Henry A. Skinner. The defendant claimed title under a purchase at a sheriff's sale made upon two executions, one in favor of the Branch Bank of Mobile, and the other in favor of one J. B. Skinner. He also attacked the validity of the trust deed under which the plaintiff claimed. When the defendant offered the execution in favor of J. B. Skinner, the plaintiff objected, on the ground that it was void because of the death of J. B. Skinner at the time of its issuance; and in support of this objection, he read to the court the record of proceedings in the court issuing both executions had upon a motion by Jones Fuller as assignee of the bank judgment, seeking to have all the proceeds of the sale of the land paid to him because of the death of J. B. Skinner at the time of the issuance of the execution in his favor, and its consequent invalidity, which motion the court granted upon this ground. The defendant's objection to the admissibility of this record was sustained. The execution was then read to the jury, contrary to the plaintiff's objection. There was a variance between the judgments and executions, and the recitals of them in the sheriff's deed to the defendant. The bank's judgment was rendered December 2, 1845, and was for three thousand four hundred and eighty-four dollars and thirty cents. Six executions issued on this judgment, the last of which issued on the eighteenth of June, 1852, and under this the sale was made. J. B. Skinner's judgment was rendered October 27, 1845, and was for one thousand four hundred and fifty-two dollars and fifty cents. Three executions issued upon this, the last of which issued the third of May, 1852, and this the sheriff levied on the same lands. The sheriff's deed recited that "whereas, by virtue of two executions issued out of Clarke and Mobile counties, to me directed and delivered, tested the third May and eighteenth June, 1852, I was commanded to take of the goods and chattels of Henry A. Skinner the sum of five thousand three hundred and four dollars and fifty cents, which the branch of the bank of the state of Alabama, at Mobile, and J. B. Skinner, have recovered against him in the said courts." There were also several variances between the descriptions of the land in the

deed and in the sheriff's indorsement on the executions. The court overruled the plaintiff's objection to the admissibility of the deed, on the ground of these variances. For the purpose of rebutting the defendant's evidence of fraud in the trust deed under which the plaintiff claimed, the plaintiff offered the deposition of Henry A. Skinner. The commissioner who took the deposition certified at the end thereof that he had personal knowledge of the identity of the witness, and that his evidence and answers under oath were reduced to writing and examined by the witness, and by him approved; that the witness's name was not subscribed to the deposition, because he died before the document could be prepared. The defendant objected to the admission of this deposition, and in support of his objection, read a deposition of the same commissioner, stating that he allowed Skinner to take the interrogatories home with him on his representation "that he desired to be very particular about the matter, and that it would be necessary for him to refer to some old papers in his possession;" that Skinner afterwards returned the interrogatories to him with his answers thereto, written out, as he said, by himself; that the commissioner then asked Skinner to call the next day to sign and swear to the answers after they had been copied, and that he never saw Skinner again. The deposition of Skinner was excluded, and the plaintiff excepted. The plaintiff reserved exceptions to the various rulings of the court, and now appeals.

E. S. Dargan and John T. Taylor, for the appellant.

F. S. Blount, contra.

By Court, RICE, C. J. The execution in favor of Joseph B. Skinner against Henry A. Skinner was offered by the defendant in this action, in connection with other evidence, to show title in himself to the land in controversy. It was not void on its face. Conceding that its weight and effect would have been destroyed by proof of the fact that the plaintiff therein (the said Joseph B. Skinner) died before it issued; yet as that fact was not admitted, but was contested, its determination in this action belonged, not to the court, but to the jury. As the execution was *prima facie* valid and admissible, and its invalidity depended upon a question of fact, which the jury alone, in this case, were competent to determine, the court properly admitted it in evidence; that being the only course which would secure to the defendant the benefit to which he was entitled from the ex-

ecution in the event the jury determined the aforesaid question of fact in his favor: *Driver v. Spence*, 1 Ala. 540.

The record of the motion made by Jones Fuller, assignee of the Branch Bank at Mobile, and of the action of the court thereon, was offered as evidence against the defendant in the present action, of the fact that Joseph B. Skinner died before the issue of the aforementioned execution. It is certain that the plaintiff in this action was neither a party nor privy to that motion; and that if the decision upon that motion had gone the other way, it could not have been used by the present defendant against him as evidence of the fact of the death of the said Joseph B. Skinner before the execution issued. It is a rule that a record is not evidence of the facts recited except between the parties to it or privies; nor in favor of one who was neither party nor privy, and against whom it could not have been evidence of the facts recited: *Blann v. Chambliss*, 9 Port. 412; *Harris v. Plant*, 21 Ala. 639; *Atwood v. Wright*, 29 Id. 346, and authorities there cited.

The variance between the judgments and executions under which the sheriff sold the land, and the recitals of those judgments and executions in his deed, did not render his deed inadmissible: *Driver v. Spence*, *supra*.

There was no error in rejecting the instrument offered as the deposition of H. A. Skinner, under the notice and agreement that the motion to that effect might be heard at any time during the trial. To entitle a party to the introduction of a deposition at law, when its admissibility is properly objected to, it must appear that the requisitions of the statute in relation to the taking of depositions have been substantially complied with. That does not appear in this instance, when the testimony of the commissioner is noticed: Code, sec. 2322; *Ulmer v. Austill*, 9 Port. 157; *Herndon v. Givens*, 16 Ala. 261.

Judgment affirmed.

EXECUTION, EFFECT OF DEATH OF DEFENDANT: See *Davis v. Onoalt*, 68 Am. Dec. 182, and note citing prior cases 186; *Hodge v. Mitchell*, 61 Id. 524.

SHERIFF'S DEED NOT FULLY RECITING JUDGMENT IS ADMISSIBLE in connection with the judgment and execution to show the officer's authority to sell: *Bettison v. Budd*, 65 Am. Dec. 442, note 452. Misrecital of judgment in sheriff's deed is not fatal: *Phillips v. Coffee*, 63 Id. 357, note 361.

JUDGMENTS AND DECREES ARE BINDING ONLY UPON PARTIES AND PRIVIES: *Detrick v. Migatt*, 68 Am. Dec. 584; *Thomason v. Odum*, Id. 159, and notes.

DEPOSITION OBJECTED TO IS NOT ADMISSIBLE WHEN NOT TAKEN IN CONFORMITY TO STATUTE: *Avery v. Avery*, 62 Am. Dec. 513, and note 518.

HENDERSON v. SIMMONS.

[28 ALABAMA, 291.]

ADMINISTRATOR IS CHARGEABLE ON FINAL SETTLEMENT WITH REASONABLE RENT for house and lot belonging to the estate and occupied by him.

EXPENSE OF REPAIRING HOUSE BELONGING TO ESTATE WILL BE ALLOWED AS CREDIT to administrator, upon proof that the repairs were necessary, and that the price was reasonable and has been paid.

CREDITOR'S RECEIPT FOR DEMAND ENTITLES ADMINISTRATOR TO CREDIT for payment of the same, though it appears that the subject is still open for adjustment upon the settlement of their private accounts.

ADMINISTRATOR MUST PERFORM ALL ORDINARY SERVICES OF ADMINISTRATION if reasonably within his power, and he is not entitled to special or extraordinary compensation therefor.

ADMINISTRATOR MAY EMPLOY AGENTS FOR EXTRAORDINARY SERVICES OF ADMINISTRATION, and for such as, in their nature, require a degree of skill or appliances not within the command of ordinary persons; and reasonable expenses incurred in this way for the benefit of the estate are a proper charge against it.

SURETY OF ADMINISTRATOR IS NOT COMPETENT AS WITNESS to prove items of credit upon final accounting.

REASONABLE COSTS AND EXPENSES OF PROPOUNDING WILL FOR PROBATE are a proper charge upon the estate, if the executor have no knowledge or reasonable grounds for suspicion against the legality of the will, and propound the paper in good faith.

SUCCEEDING ADMINISTRATOR MAY PAY REASONABLE COSTS AND EXPENSES OF PROPOUNDING WILL FOR PROBATE and charge the estate therewith, when the executor propounded the will *bona fide*, and after incurring such expenses resigned the trust without making payment, and received no credit in his account for such expenses.

EXPENSES OF PROPOUNDING PAPER FOR PROBATE AS WILL are not a proper charge against the estate, when the executor incurs the expenses in a fruitless attempt to establish the will while there are within his knowledge good grounds against its validity; but this question depends in a great degree upon the good faith of the executor and the circumstances of the particular case, *semble*.

RIGHT TO CHARGE ESTATE WITH EXPENSES OF PROPOUNDING WILL FOR PROBATE is limited to proper expenses incurred in a fair and lawful trial of the issue *devisee vel non*, and does not embrace money paid to silence opposition to the establishment of the will.

ATTORNEY FEES FOR SERVICES AT CONTEST OF PROBATE OF SUPPOSED WILL are not allowable on final accounting of administrator *de bonis non*, if such services were not engaged by the proponent and executor, but by the principal legatee under the will, who afterwards became the administrator *de bonis non*.

COSTS OF SUITS AGAINST ADMINISTRATOR ON WITNESS CERTIFICATES issued in an action instituted by him are not a proper charge against the estate, when it appears that the certificates were a proper charge against the estate, and that at the time of the commencement of suits thereon he had in his hands assets sufficient to pay them.

LAW DOES NOT VISIT ADMINISTRATORS WITH SEVERER INTENDMENTS, in the matter of allowances to them, than are indulged against agents generally.

IN the matter of the estate of Edward Henry, deceased, on final settlement of the accounts of Mrs. Simmons, the administratrix, at the instance of John Henderson, a succeeding administrator *de bonis non*. A paper purporting to be the will of the decedent had been propounded for probate by William McPherson, the executor therein named. After probate, its validity was contested, and an issue of *devisavit vel non* was made up. The matter was compromised, and the contestants withdrew their objections to the probate. After McPherson resigned as executor, the decedent's widow, the defendant herein, was appointed administratrix *de bonis non*. She afterwards married one Simmons. She was succeeded in the duties of her trust by Thomas P. Renfro, who was succeeded by Henderson, the present plaintiff. Upon the final settlement of the accounts of Mrs. Simmons, both parties reserved exceptions to the rulings of the probate court, and both parties assign errors thereupon. Henderson moved to charge the administratrix with the reasonable rental of a house and lot in Talladega, belonging to the estate and occupied by her. The motion was overruled, and the defendant excepted. The administratrix claimed a credit, as per her voucher No. 1, for two hundred and sixty-five dollars, the amount of an account due George Elrod for repairs on the dwelling-house. The necessity of these repairs, and the performance of the work by Elrod, were proved. There was no evidence as to the value of the repairs, or the reasonableness of the charge. The court intimated that the item should not be allowed, as there was no proof of its payment, but postponed its decision until the next morning, to allow the administratrix to prove payment. The next morning, when the account was produced, Elrod had indorsed a receipt upon it. Above the receipt was written: "The foregoing account, if allowed to Angeline Simmons as the administratrix of Edward Henry, deceased, . . . will be allowed to George Elrod in his settlement of his agency in that behalf." This memorandum was signed by Simmons, the husband of the administratrix. It was proved that Elrod was her agent in the business of the estate and in her business generally. Henderson showed that the receipt was written by Elrod after Simmons signed the memorandum, and after the trial was commenced; and that no money was paid by Mrs. Simmons. It was also shown that there was a long and unsettled account relative to

Elrod's agency between him and Mrs. Simmons, each party claiming a balance in his or her favor; and that the amount of this voucher was among the items claimed by Elrod. The court allowed the item, and Henderson excepted. Voucher No. 46 was for various sums paid an agent for different services rendered in the business of the estate. It was shown that Elrod was the agent, and his affidavit was the only evidence offered to sustain the voucher. It was admitted that Elrod was one of the sureties on the official bond of the administratrix. Henderson objected to the allowance of the account, on the ground that Elrod was not a competent witness, and because the items thereof were not proper charges against the estate. The court overruled the objection as to the competency of Elrod, and allowed one hundred and thirty dollars out of the full amount of two hundred and sixty-two dollars and eighty cents. Henderson excepted. Among the remaining vouchers was the obligation of Mrs. Simmons, her husband, and father, to pay a contestant of the will two thousand three hundred dollars, which was proved to have been executed in compromise of the above-mentioned contest regarding the probate of the will. Other vouchers were the receipted accounts for attorney's fees paid by the administratrix on account of professional services rendered upon the contest of the will. The attorneys, it appeared, were employed by Mrs. Simmons before she became the administratrix of the estate. Other vouchers were receipts of witness certificates, clerk's fees, sheriff's fees, etc., in the same case. The court refused to allow the voucher for the amount paid, or agreed to be paid, on the compromise of the contest; but allowed the other vouchers. Exceptions were reserved by both parties. Finally the administratrix claimed credit for the amount paid by her on judgments recovered on witness certificates. It appeared that the certificates were issued to witnesses summoned by Mrs. Simmons in an action by her as administratrix against B. M. Fluker. The actions on the certificates were brought against Thomas P. Renfro, the then administrator, and the costs thereof amounted to about sixteen dollars. The account of the administratrix showed that at the time of the institution of the suits the administratrix had in her hands available assets to the amount of about fourteen thousand three hundred and seventy dollars. Henderson objected to the allowance of any part of the costs of the suits, and excepted to the overruling of this objection.

Henderson and McGee, for the appellant

Parsons and J. White, contra.

By Court, STONE, J. The facts in this record are not full enough to satisfy us that the probate court committed any error in the matter of the corn sold.

Mrs. Simmons, having occupied the house and lot in the town of Talladega, during the greater part of the year 1854, is chargeable with a reasonable rent therefor: *Smith v. King*, 22 Ala. 558.

The court did not err in allowing voucher No. 1. The repairs on the house and lot are shown to have been necessary, and the testimony satisfies us that they were performed. We find nothing in the record to convince us that the repairs were not worth the price paid; but on the contrary, we think it was reasonable. Mr. Elrod has receipted for this demand; and notwithstanding the subject is still left open for adjustment between him and Mrs. Simmons in their private accounts, it can never again be made a charge against the estate. There was no error in allowing this item: *Pinckard v. Pinckard*, 24 Ala. 250.

It is evidently the duty of an administrator to perform all the ordinary services of the administration, if reasonably within his power. For these ordinary services in performing ordinary duties, he is not entitled to special and extraordinary compensation. For expenses necessarily incurred in and about the administration, he is entitled to be reimbursed. See *Newberry v. Newberry*, 28 Ala. 691. For extraordinary services, and for such as in their nature require a degree of skill or appliances not within the command of ordinary persons, he may employ agencies; and reasonable expenses in this way incurred for the benefit of the estate are a proper charge against such estate: *Pinckard v. Pinckard, supra*; *Reese v. Gresham*, 29 Id. 91; *Shepherd's Digest*, 162, 164, 165. Mr. Elrod was surety of Mrs. Simmons on her administration bond. If a decree be rendered against Mrs. Simmons, and execution returned "no property found," an execution can then issue against him, also, for the collection of such decree: Code, sec. 1922. Voucher No. 46 rests alone on Mr. Elrod's evidence. He was not a competent witness for the administratrix; and this item, without other proof, should be rejected: Code, sec. 2302; *McCreliss v. Hinkle*, 17 Ala. 459.

It is the privilege, if not the duty, of one named as executor of a paper purporting to be a last will and testament to propound it for probate. If he have no knowledge or reasonable grounds on which to predicate a well-grounded suspicion against the

legality of the will, and propound the paper in good faith, he but carries out the intention with which he was appointed. Any reasonable costs and expenses incurred by him in the honest endeavor to give effect to the will is a proper charge on the estate in his hands. Further, if he, after incurring such expenses, resign the trust without making payment, and receive no credit in his account for such expenses, a succeeding administrator in the execution of the will may pay such expenses and charge the estate therewith.

On the other hand, if the executor incur expenses in the fruitless attempt to establish a will, when there exist within his knowledge good grounds against its validity, a different rule prevails. This question in a great degree depends on the good faith with which the executor has acted. We lay down no absolute rule for the government of all cases, for each must to a considerable extent depend on its own circumstances. The right to charge the estate, however, in all cases, will be limited to proper expenses incurred in a fair and lawful trial of the issue *devisum vel non*. It cannot be so extended as to embrace money paid to silence opposition to the establishment of the will: *Koppenhaffer v. Isaacs*, 7 Watts, 170; *Royer's Appeal*, 13 Pa. St. 569; *Scott's Estate*, 9 Watts & S. 98; *Goddie's Appeal*, 9 Watts, 284; *Bradford v. Boudinot*, 8 Wash. 122; 1 Williams on Executors, 271; 1 Lomax on Executors, 203; *Wills v. Spraggins*, 3 Gratt. 568, 569.

Under these rules, we affirm the decree of the probate court in allowing the costs of the contest of the will, and in disallowing the item of two thousand three hundred dollars paid Edward Henry, jun., on compromise.

The item of attorneys' fees we would allow if Mr. McPherson, the executor and proponent, had employed them. He, however, had nothing to do with it. They were employed by Mrs. Simmons, when she had no right to charge the estate. Not standing in any relation which made it either her legal or moral duty to establish the will, the expenses incurred by her to that end must be regarded as incurred for her personal emolument, and are only a personal charge on her: *Dietrick's Appeal*, 2 Watts, 332. That item must be disallowed.

The matter of the receipt of Looney will probably not again be presented as it now is. The proof in the record is, perhaps, not full enough to exonerate the administratrix. The inventory is not before us, and we are not informed how she returned those notes to the probate court. We deem it unnecessary to comment further on this item.

There is nothing in this record which enables us to determine that the witness certificates, in the suit against Fluker, were not a proper charge against the estate. The costs incurred on them after judgments were rendered were incurred in her own wrong, as she had effects of the estate, and ought to have made payment.

Having disposed of all the questions raised by this record, we feel it our duty to remark that some of the objections taken in this case betray a too rigid economy in the matter of allowances to administrators. They (administrators) fill a fiduciary relation which is indispensable in our judicial system; and in the absence of bad faith, the law does not visit them with severer intendments than are indulged against agents generally: See *Gould v. Hayes*, 19 Ala. 438.

Judgment of the probate court reversed, and cause remanded.

The principles we have announced dispose of the cross-assignments of error adversely to the party making those assignments. It results that there is no error in this record prejudicial to Mrs. Simmons.

ATTORNEY FEES PAID IN OPPOSING CAVEAT TO VACATE WILL ARE PROPERLY ALLOWED: *Compton v. Barnes*, 45 Am. Dec. 115; see also *Bendall v. Bendall*, 60 Id. 469. No counsel fees will be allowed when the administrator engages in useless litigation: *Bendall v. Bendall*, Id. 469, note 477.

EXPENSE FOR SERVICES WHICH ADMINISTRATOR COULD NOT BE SUPPOSED COMPETENT TO RENDER is properly allowed, but expenses for services rendered in the ordinary course of the administration are not allowable: *Teague v. Dendy*, 16 Am. Dec. 643; see *Nimmo v. Commonwealth*, 4 Id. 488.

THE PRINCIPAL CASE IS CITED to the point that in the reduction of choses in action to money, the administrator may by compromise or otherwise do what a prudent man would do in reference to his own affairs, and he is accountable only for losses that are the result of his own carelessness or want of good faith: *Glenn's Adm'r v. Billingslea*, 64 Ala. 352.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

LAWSON v. JORDAN.

[19 ARKANSAS, 297.]

SHERIFF MAY FILE BILL OF INTERPLEADER AGAINST JUDGMENT CREDITORS to have their respective priorities and rights determined in the fund arising from the sale of the same property of a debtor under all of several executions.

LIEN OF JUDGMENT CANNOT BE EXTENDED BY EXECUTION OR LEVY. It can only be continued by *scire facias*.

PROCEEDS OF REAL ESTATE SOLD UNDER VARIOUS EXECUTIONS MUST BE APPLIED to those executions under which the property was sold, and according to the priority of the judgment liens, without regard to prior judgments not levied.

JUDGMENTS AND THEIR LIENS ARE UNAFFECTED BY DELIVERY BONDS BEING TAKEN AND FORFEITED, where such bonds do not, upon forfeiture, operate as judgments, and therefore extinguish the original judgments.

JUDGMENT LIEN IS NOT AFFECTED BY ORDER TO RETURN PROCESS, without *sa. &c.*

JUDGMENT LIENS ARE ENFORCED IN EQUITY IN SAME MANNER AS AT LAW.

IRREGULARITY IN SELLING LANDS UNDER FIERI FACIAS CLAUSE IN VENDI- TION! EXPOSURE CAN BE TAKEN ADVANTAGE OF by the judgment debtor only, in a direct proceeding, and cannot be made a question among his creditors on a distribution of the proceeds arising from the sale.

BILL of interpleader. The facts are stated in the opinion.

Pike, for the appellants.

Curran and Gallagher, and *S. H. Hempstead*, for the appellees.

By Court, **HARLY, J.** James Lawson, jun., late sheriff of Pulaski county, sold the real estate of Thomas Thorn on the twenty-first of April, 1845, under various executions in his

Jan. 1858.]

LAWSON v. JOHNSON

hands, issued on judgments against the said lands, times between 1840 and 1844. The sum amounted to eight thousand one hundred and of which sum one thousand one hundred dollars, under a decree in favor of R. B. Thorn's creditors on foreclosure of the said land, the tenth of February, 1842, on a portion of the sum paid over to Brownlee and taken out of the sum having been taken from that decree, the balance was regarded as rightfully made; and hence the sum in the sheriff's hands for distribution was seven thousand and six dollars, and the balance was in controversy in the proceeding now on.

There were thirty-three judgments on the said lands at various periods, on some of which the said sum had been satisfied, and on others there was no term at all, and on one no process in the said land. The trustees of the Real Estate Bank of the said portion of the lands sold, executed a deed of the said portion upon most of these judgments and on the said sum a portion was claimed. The sheriff, to protect the said sum, the Pulaski circuit court for direction distributed the funds substantially as the said sum, which not being satisfactory to some of the said parties, was taken to this court, where it was held that the court had no jurisdiction to make distribution; the cause was dismissed, and the parties returned to where they were before: See *Trapna v. Lawson*. Lawson then filed a regular bill of interpleader, calling on the creditors of the said sum to appear each other, and have their respective claims determined, and that he might be protected in the said sum. Several of the parties appeared, and on final hearing, the said sum of seven thousand and six dollars was paid, and appropriated by the sheriff on the said sum in the order in which they are here named in the order of this proceeding, to wit:

1. Jared C. Martin, as administrator of the said sum, ordered September 8, 1841; *sci. fa.* April the thirtieth of May, 1844; amount due the said sum April, 1845, eight hundred and sixty-cents.

2. Bonaparte J. McHenry, rendered the third of November, 1841; *sci. fa.* September 13, 1844, and revived the fourteenth of May, 1846; amount due the twenty-first of April, 1845, one thousand four hundred and ten dollars and thirty-five cents.

3. Jared C. Martin, as administrator of James Danley, rendered the thirteenth of May, 1842; *sci. fa.* twenty-fifth of April, 1844, and revived the thirtieth of May, 1844; amount due thereon twenty-first of April, 1845, one thousand two hundred and forty-two dollars and twelve cents.

4. Ashley & Watkins, use of Trapnall & Cocke, rendered the first of July, 1843; amount due the twenty-first of April, 1845, two hundred and eleven dollars and seventy-nine cents.

5. Trapnall & Cocke, rendered the twenty-sixth of November, 1842; amount due thereon the twenty-first of April, 1845, seven hundred and eighty-eight dollars and twenty-one cents.

6. Drennen and Rector, as administrators of Wharton Rector, rendered the twenty-fourth of November, 1842; amount due thereon the twenty-first of April, 1845, two thousand one hundred and forty-eight dollars and thirty-five cents.

7. Trapnall & Cocke, rendered June 22, 1843; amount due thereon the twenty-first of April, 1845, one thousand two hundred and thirty dollars and fifteen cents—as far as the fund would go on this judgment.

These were all judgments rendered against Thorn in the Pulaski circuit court, and on each of which there was effective process to the sale term, and which came to hand in time to advertise and sell.

In point of fact, the property of Thorn was advertised and sold under all the executions in the sheriff's hands, and not under any particular one, and the fund produced from the sale was decreed to be distributed in the order and upon the judgments as above stated, the court, as it is presumed, acting on the general principle that the priority of subsisting liens by judgment should prevail, and liens by execution be disregarded as creating no lien in opposition or paramount to the judgment.

From the decree rendered as above, Lawson himself, the trustees of the Real Estate Bank, and various other parties appealed to this court.

The facts stated in the answers were admitted to be correct, and there were also sundry elaborate abstracts filed in the cause, which were likewise admitted and received as correct, showing the dates, amounts, and condition of all the judgments at the time, the nature of the executions issued thereon, and when

issued, and on what property levied, and also showing on particular property each execution was levied; delivery taken and judgments on delivery bonds, and other information as to the judgments and execution.

The case is extremely complicated, and to go through these abstracts would swell this opinion into a volume, to no useful purpose; nor is there any occasion to make a more particular statement of the facts of the case than as we have made, to the proper understanding of it, or its decision.

Having said this much by way of explanation, we will at proceed to the solution and determination of the several questions of law arising upon the record before us.

1. We have no doubt of the jurisdiction of the court in this case, if for no other reason than that it would prevent a multiplicity of suits. In *Kring v. Green's Ex'rs*, 10 Mo. 195, it was held that it is competent for a sheriff to file a bill of interpleader. See also *Williamson v. Johnston*, 12 N. J. L. 86; *Stebbins v. Walker*, 14 Id. 99 [25 Am. Dec. 499]; *Martin v. Lofland*, 1 Smed. & M. 317; *Barnet v. Bass*, 10 Ala. 951; *Turner v. Lawrence*, 11 Id. 427; *Myers' Appeal*, 2 Pa. St. 463; *McDowell v. Jefferson*, 8 Harr. (Del.) 25; *Reigart's Appeal*, 7 Watts & S. 1; *Matthews v. Warne*, 11 N. J. L. 295.

2. Most of the difficulty arising in this cause proceeded from an unfounded idea, entertained by some of the parties at the time, that there was a lien on land in virtue of a levy by execution; and this court seems at one time to have fallen into the same error, in the case of *Trustees of the R. E. Bank v. Watson*, 10 Ark. 74, but which was speedily and properly overruled in *Tinnall v. Richardson*, 14 Id. 543 [58 Am. Dec. 338]. It has now become settled law that the lien arises from the judgment, and it cannot be extended a single day beyond the statutory period by means of an execution or levy, and can only be continued *scire facias*, as provided by law.

The lien of a judgment commences on the day it is rendered and continues for three years only, unless it is kept alive by *scire facias*. And so true is it that the execution or levy does not prolong or affect the judgment lien, that if the execution is sued out and comes to hand before the lien expires, but the sale does not take place until afterwards, the title under the sale relates to the day when the execution came to hand, and not to the date of the judgment: See *Little v. Harvey*, 9 Weibull 157; *Graff v. Kip*, 1 Edw. Ch. 620; *Tufts' Adm'r v. Tufts*, 18 Weibull 622; *Dickenson v. Gilliland*, 1 Cow. 481; *Mower v. Kip*, 6 Paige

90; *Bos v. Swart*, 5 Cow. 294; *Mower v. Kip*, 2 Edw. 167; *Ex parte Peru Iron Co.*, 7 Cow. 540. And in such a case a junior judgment with the lien would have priority over one without but of older date.

The court, in making this distinction, rightly adopted the rule of priority of lien by judgment; and in so doing, adhered to the law as it has always existed in this state, whatever opinions may have been entertained to the contrary.

3. It is clear that, in the appropriation of the proceeds of the real estate, sold under various executions, the money must be applied to those executions under which the property was sold, and according to the priority of the judgment lien. It was so expressly decided in *Robertson v. Green*, 6 How. (Miss.) 228, and also in *Hand v. Grant*, 10 Smed. & M. 514, 518, in which last case it was said that a junior judgment levied is entitled to be satisfied out of the proceeds of a sale over a prior judgment not levied. And this accords with our statute on the subject, which provides "that a sale of lands under a junior judgment shall pass the title of the defendant, subject to the lien of all prior judgments and decrees then in force;" and further, that "the money arising from such sale shall be applied to the payment of the judgment under which it may have been made:" See Dig. 623; also *Andrews v. Wilkes*, 6 How. (Miss.) 554. And the same rule would apply to prior incumbrances, such as mortgages, etc., because a party purchasing is presumed to do so, in view of all previous subsisting liens and incumbrances of record, or known to him; and the price given by the purchaser will be presumed to be graduated so as to enable him, without loss, to make such prior liens good if required to do so by executions or other proper proceedings; in other words, he takes the estate *cum onere*.

4. It is insisted by some of the appellants that as to those judgments under which delivery bonds had been taken and forfeited, and no further proceedings had on the bonds, the judgments must be postponed. But that position is clearly untenable under the law as it then stood. A levy on the personal property of a defendant to an amount equal to the debt, and such property coming to his possession again, as by giving a delivery bond (which then did not upon forfeiture, as is now the law, operate as a judgment, and therefore as an extinguishment of the original judgment), was no satisfaction, nor did it affect or impair the lien of the judgments, or prevent another levy upon a new execution. The whole doctrine was elaborately

considered and discussed in *Biscoe v. Sandefur*, 14 Ark. 568, decided by this court. The question was then fully settled, and has since been followed in a variety of cases.

There was no error committed by the court in this case in holding judgments thus circumstanced unaffected by the delivery bonds, and as still maintaining their liens. There would be a difference now, in consequence of the change in the law, because now a forfeited delivery bond has the force and effect of a judgment, and necessarily extinguishes the previous judgment; but such was not the case as to the delivery bonds in question.

5. It is next insisted that some of the judgments which the court ordered to be paid had lost their lien, and been postponed by the return of process thereon by order of the plaintiffs. But neither is this position maintainable, because it is well settled that the statute continues the lien of the judgment creditor for three years unless displaced by some act of the party. Delay to sue out process, or levying process and an order for its return without sale, have never been considered as discharging or affecting the judgment lien. Such acts do not amount to an abandonment of the lien or a release of the property: See *Rankin v. Scott*, 12 Wheat. 177; *Watkins v. Wassell*, 15 Ark. 73; *Trapnall v. Richardson*, 13 Id. 551 [58 Am. Dec. 338]. And it was so expressly held by this court in the more recent case of *Shall v. Bisco*, 18 Id. 156.

The court committed no error in regarding judgment liens as still subsisting, although process and writs of *vend. ex.* had been ordered to be returned by the plaintiffs or their attorneys without further action. And such judgments were properly taken and considered in the distribution of the fund in question.

6. As to the mortgage, it is wholly unnecessary to discuss or consider any question arising on it, because the fund being first applied to judgments having priority in any event, such fund becomes exhausted without reaching the mortgage. Any discussion, therefore, on that point would be purely speculative and fruitless. And the same may be said of judgments that cannot be reached by reason of the fund falling short.

7. Although a judgment lien is a legal right, yet it will be recognized, protected, and enforced by courts of equity in the same manner as at law, in accordance with the maxim, *Equitas sequitur legem*. And courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and enforce antecedent liens, claims, and charges existing upon

Hence, as this fund was raised for distribution among several creditors from the sale of the real estate of Thorn, the same liens exist on the money that existed against the land before the sale, and such liens are to be discharged out of the fund according to priority. In other words, the liens are transferred from the land to the money: See *De la Vergne v. Evertson*, 1 Paige, 181 [19 Am. Dec. 411]; *Purdy v. Doyle*, Id. 558; *Averill v. Loucks*, 6 Barb. 478; *Codwise v. Gelston*, 10 Johns. 519, 522; 2 Fonbl. Eq. 403; *Buchan v. Sumner*, 2 Barb. Ch. 195 [47 Am. Dec. 805].

If the fund were sufficiently large to require an adjudgment of the liens of all the thirty-three judgments remaining unsatisfied under the decree of the court below, it is conceived it could not be attended with difficulty. Judgments which were a lien, and on which was effective process in the hands of the officer, would have to be paid or satisfied in full, first, according to priority of lien. Judgments on which the lien had ceased would rank, in relation to each other, according to priority of date; and would be postponed to judgments constituting a lien, and become, as to them, as if subsequently rendered: See *Ex parte Peru Iron Co.*, 7 Cow. 540; *Allen on Sheriffs*, 195; *Pettit v. Shepherd*, 5 Paige, 498 [28 Am. Dec. 437]; *Little v. Harvey*, 9 Wend. 157; *Graff v. Kip*, 1 Edw. Ch. 619; *Tufts' Adm'r v. Tufts*, 18 Wend. 621; *Scott v. Howard*, 8 Barb. 819.

8. It appears that under some of the executions lands were sold under a *fi. fa.* clause in the *vend. ex.*; but that was only an irregularity in the process, which could be taken advantage of alone by the judgment debtor himself on a direct proceeding for the purpose, and consequently could not be made a question of among his creditors on a distribution or on a collateral proceeding. The process was not void: See *Whiting v. Beebe*, 12 Ark. 421; *Jackson v. Robins*, 16 Johns. 576; *Jackson v. Bartlett*, 8 Johns. 861; *Woodcock v. Bennet*, 1 Cow. 737 [18 Am. Dec. 568].

The only error the court did commit was in giving judgments Nos. 4 and 5 priority over No. 6, as above shown; because the last judgment, No. 6, was rendered before them; nor had it lost its lien or right to prior satisfaction in full. But this error is productive of no injury to the representatives of the Drennen and Rector judgment, No. 6, because the fund is sufficient to discharge it in full, and leave a balance to be applied to the judgment of Trapnall & Cocks, No. 7; and such being the case,

it would serve no useful purpose to change the order of contribution in that respect.

9. The views already expressed dispose of the entire far as Lawson's interest is involved, outside of the costs by him out of the fund. We shall therefore not stop to go further in respect to his rights in the controversy.

Upon the whole record, we are of opinion that the judgment of the Pulaski circuit court in chancery ought to be, and is affirmed in all things, affirmed with costs.

SHERIFF, WHEN MAY MAINTAIN BILL OF INTERPLEADER: See *Shaw v. Coster*, 35 Am. Dec. 690, and note 706; *Quinn v. Green*, 36 Id. 46. Analogously, see note to *Shaw v. Coster*, 35 Id. 695; *Yarborough v. Thompson*, 626; *Gibson v. Goldthwaite*, 42 Id. 592; *Adams v. Dickson*, 65 Id. 11.

JUDGMENT LIEN NOT CONTINUED BY LEVY OF EXECUTION: Note to *Missouri v. Wells*, 51 Am. Dec. 166; *Trapnall v. Richardson*, 51 Id. 58, and note 363.

APPLICATION OF PROCEEDS ON EXECUTION SALE IN CASE OF LIENS: See *Mohler's Appeal*, 47 Am. Dec. 413.

PRIORITY AMONG EXECUTIONS: See *Million v. Commonwealth*, 36 Id. 580, and note collecting prior cases; *Rogers v. Dickey*, 41 Id. 204; *Missouri v. Wells*, 51 Id. 163; *Keyser's Appeal*, 53 Id. 487; *Dunkley v. Johnson*, 64 Id. 460; *Johnson v. Gorham*, 65 Id. 501.

FORTHCOMING OR DELIVERY BOND, EFFECT OF: See *Lantz v. Wells*, 45 Am. Dec. 683, and note; note to *Trapnall v. Richardson*, 58 Id. 58.

ELLIS v. CLARKE.

[19 ARKANSAS, 420.]

JUDGMENT OF COMPETENT TRIBUNAL IS CONCLUSIVE upon matters determined, and also upon matters which the parties might have controverted in the case.

JUDGMENT AGAINST HUSBAND AND WIFE IS NOT NECESSARILY ENJOINED because it may properly be rendered for a debt due by the wife at the time of the marriage.

DEFENDANT IS NOT ALLOWED PLEA OF INTERPLEADER, under chapter 38, of the Arkansas digest.

DEBT on a judgment against Benjamin F. Ellis and Sarah A. Ellis. The facts are stated in the opinion.

Watkins and Gallagher, for the appellants.

Cummins and Garland, for the appellees.

By Court, SCOTT, J. The appellee declared in the usual manner in debt, upon the record of a judgment against the appellant recovered, and remaining unsatisfied, in the circuit court.

Marshall county, in the state of Mississippi, and sued out a writ of attachment, which was levied upon a slave as the property of the appellants.

Upon a showing of the non-residence of the appellants, the statutory notice was ordered and published.

At the return term the appellants appeared and interposed three pleas—that is, Sarah pleaded: 1. That at the time of the making of the contract which was the foundation of the judgment she was a married women, and has since been so; 2. That at the time of the rendition of the judgment she was the wife of Benjamin, and is still so. Benjamin pleaded that at the time of the rendition of the judgment Sarah was his wife, and is still so. A demurrer was interposed to each of these pleas, which the court sustained, and the appellants excepted.

The appellants then pleaded payment, to which the appellees took issue, and also filed a plea of interpleader, setting up that the slave upon which the attachment was levied was the sole and separate property of Sarah. This latter having been demurred out, the case was tried upon the issue, upon the plea of payment, by the court sitting as a jury, and judgment having been rendered for the appellees for the debt claimed, the other party brought the case here by appeal, neither party having put anything upon the record by bill of exception.

With regard to the matter of coverture presented by the three pleas first above named, we think the appellants were estopped to set that up by the record of the judgment proceeded upon. When a matter has been finally determined by a competent tribunal, in which the parties had a fair opportunity to be heard, it ought to be considered at rest; and that principle not only embraces what actually was determined, but also extends to every matter which the parties might have litigated in the case: *Bauman v. Bauman*, 18 Ark. 332, 333 [68 Am. Dec. 171].

Upon common-law principles, irrespective of any peculiar law of the state of Mississippi—of which we have none in proof in this case—a judgment in a court of law against husband and wife is not necessarily erroneous; much less is it void upon its face, because such a judgment may be properly rendered for a debt due by the wife at the time of the marriage: 2 Bright on H. & W. 3, 4; Ark. Dig., c. 1, sec. 5, p. 98. The execution of such a judgment during the coverture, however, as against the wife and her sole and separate property, is quite a different thing. Imprisonment for debt having been abolished in this state, and females being especially exempt from arrest on civil

process, Dig., p. 161, sec. 7, the *capias ad satisfaciendum* be no longer available to coerce the wife to pay the debt out of her sole and separate property as a means of deliverance from prison. And it is not easy to see how the process of a court of law can be made to reach sole and separate property to which the wife has but an equitable title and interest, unless such sole and separate property should have been created out of the wife's antenuptial property, under such circumstances as to make the settlement void as to her creditors.

These difficulties are urged by counsel as ample reason against the allowance of a judgment at law against a married woman in any case. But they are certainly not conclusive; because, though in the case put the judgment would make the wife's debt the husband's own, and it would continue so, notwithstanding the wife might die before execution, nevertheless it remains no less the wife's debt also; and so far as she might be concerned, the difficulties of execution would be removed upon the death of her husband, she surviving, because then her legal capacity and legal responsibility, which had been suspended during the coverture, would rise up, and although it might be true that the only advantage to the plaintiff in the judgment might be this contingent one, there could be no good reason for depriving him of that, or any other legal right connected with his claim to have the debt paid: 2 Bright on H. & W., p. 8, sec. 9, 12, 13, p. 88, secs. 6, 8.

With regard to the other point, there is no error in the ruling of the court; because the plea of interplea, allowed by the statute, Dig., c. 17, p. 180, sec. 38, is to be interposed only by some person "other than the defendant." A defendant is not allowed this plea. If the property attached is not subject, other remedy is open to the party in interest.

Finding no error in the record, the judgment will be affirmed.

JUDGMENT IS CONCLUSIVE AS TO WHAT MATTERS: See *Wilson v. Strip*, 61 Am. Dec. 138; *Lee v. Kingsbury*, 62 Id. 546; *Emery v. Fowler*, 63 Id. 62; *Norton v. Doherty*, Id. 758; *Lord v. Chadbourne*, 66 Id. 290; *Sawyer v. Woodbury*, Id. 518. Nothing can be pleaded to an action on a judgment that could have been litigated in the original action, except the question of jurisdiction: *Jones v. Terry*, 43 Ark. 232; the defendant is estopped from setting up any matter in defense that was actually determined, or that might have been litigated in the proceedings on which the recovery was had: *Morris v. Curry*, 41 Id. 78, both citing the principal case.

HENDERSON v. MARTIN.

[19 ARKANSAS, 477.]

AGENT MAY MAKE CONTRACT HIS OWN, while contracting as such, whether known as an agent or not; and such liability cannot be affected, although in an action of *assumpsit* against the principal it would be competent to show the existence of an authority to the agent to enter into the contract, and thus make the principal liable also.

AGENT IS ALONE LIABLE ON SEALED INSTRUMENT, where it purports to be the deed of the agent and not the deed of the principal, although the agent describes himself as the agent of another.

COVENANTORS ARE BOUND PERSONALLY BY COVENANT in which they describe themselves as a committee on the part of a certain company, and after reciting a sale of property, bind themselves to deliver it at a designated place and time.

COVENANT. The opinion states the facts.

Williams and Williams, for the appellants.

S. H. Hempstead, for the appellees.

By Court, Scott, J. This was an action of covenant by the appellants against the appellees, assigning for breach the non-delivery of the property specified in the covenant, although specially demanded. The following is a copy of the covenant, copy having been granted, to wit:

"Know all men by these presents, that we, the undersigned committee on the part of the Little Rock Lumber and Manufacturing Company, have this day sold to J. R. Henderson and Jahiel Jones, of the firm, name, and style of Henderson & Jones, the following property, to wit: One steam-boiler, one steam-doctor, one steam-engine, one saw-sash and carriage, with all fixtures complete for sawing, and one bull-wheel with carriage. The above property we bind ourselves to deliver to the said Henderson and Jones at the mill of said company in Pulaski county, near Little Rock, on the first day of August next, or sooner if required by them. Given under our hand and seal this sixteenth day of June, 1855. "T. H. McCray. [Seal.]

"JARED C. MARTIN. [Seal.]

"JOHN W. PURDOM. [Seal.]

"Committee."

There was a demurrer to the declaration, assigning for cause that it appears by the covenant that the contract declared upon was that of the Little Rock Lumber and Manufacturing Company, and not the individual contract of the appellees. The demurrer was held good, and the appellants electing to stand

upon their declaration, final judgment was rendered accordingly, and the cause brought here by appeal. The question presented is one of legal construction of the instrument declared upon. Whether the supposed principal be a corporation, or some other association of individuals, does not now appear upon the record; and whether the supposed agency existed, and the supposed agent was duly authorized in the premises, is in no otherwise affirmed than by the face of the covenant. It is a sealed instrument in which there are apt or obligatory words to charge the supposed agents personally, and no such words to charge the supposed principal.

In any case by a written contract, whether sealed or not, it is not to be doubted but that an agent, while contracting as such, whether known as an agent or not, may make the contract his own; or in other words, may voluntarily incur personal responsibility in the premises: Story on Agency, sec. 269. And when such personal responsibility might be thus voluntarily assumed by the agent, and fixed upon him in favor of the other contracting party, it could not be affected, although it might be held that in an action of *assumpsit* against the principal it would be competent to show the existence of a parol authority to the agent to enter into the contract, and thus make him liable also. To suppose that upon such proof the voluntarily assumed liability of the agent would be removed would be to suppose that a valid written contract could be contradicted and destroyed by parol evidence of a fact not at all inconsistent with its validity. Upon principle, if parol evidence could be introduced at all in such case, it could only be for the purpose of showing the liability of an additional party in an action against him, but not for the purpose of discharging another party, who might be expressly bound by his written contract. It is true that it might be a question of construction, whether the party to the written contract was or was not bound; but in the case supposed, we have assumed that he was bound by his voluntary undertaking, and have deduced the legal consequences.

In making legal constructions, however, there is a well-defined distinction between the liabilities of principal and agent respectively upon contracts under seal, and upon those not under seal, consisting mainly in the allowance of a greater latitude of construction as to instruments not under seal, in ascertaining what was, in contemplation of law, the true intention of the immediate parties to the written contract. This distinction obviously grows out of the very nature of the case—its necessity. With-

out its observance, the instrument could not be upheld at all in the one case, while in the other case it might be well enough upheld and enforced. Thus in the case of a sealed instrument, which purports to be, not the deed or covenant of the principal, but that of the agent, although the party describes himself as the agent of another, yet as the deed or covenant cannot be deemed the deed or covenant of the principal, it would be utterly without any legal effect, unless it was construed to be the deed or covenant of the agent; "and therefore, *ut res magis valeat quam pereat*, the interpretation is adopted that it is the intention of the parties that the agent shall be bound for the principal; for the law will not impute to the parties an intention to do a void act, much less will it, for such a purpose, allow the words of the instrument to be strained out of the ordinary meaning attached to them. The words, therefore, which touch the character of the agent are, in such case, treated as mere words of description, as a mere designation of the person by whose authority and for whose benefit he is acting, and not as intending to exclude a personal responsibility. In this way the whole instrument may have a sensible effect according to the import of the words used in their ordinary signification and connection:" Story on Agency, 5th ed., sec. 273, and illustrations there cited in the margin.

Supposing, in the case before us, that the supposed principal is not a corporation, but a natural person or persons, and that although in the first case it is only by the corporate seal that the body politic can covenant, but nevertheless that in the second case the seal of the agent may be taken as the seal of the natural person—as seems to be held in the case of *Randall v. Van Vechten*, 19 Johns. 60 [10 Am. Dec. 193], so much relied on by counsel—still it must be conceded that there is something more than mere sealing and delivery necessary to a covenant, and that it is no less essential that there should also be proper parts of a contract—terms to import an undertaking on the part of the principal—his proper covenant as contradistinguished from the covenant of the agent personally. There is no semblance of such terms in the case before us; the terms employed are: "We, the undersigned . . . have sold," and "the above property we bind ourselves to deliver," etc.

"It is not sufficient to charge the principal, or protect the agent from personal responsibility, merely to describe himself as agent, if the language of the instrument imports a personal contract on his part:" *Potts v. Stanton*, 10 Wend. 277 [25 Am. Dec. 558].

All such cases, however, are to be distinguished from authorized agencies on the part of the government, where a different rule of construction prevails, upon the idea that the contract is always to be taken to have been made upon the public credit.

The cases mainly relied upon as militating against the rule of construction that we maintain, as that resting upon principle and established by the great current of authority, are those of *Randall v. Van Vechten*, 19 Johns. 60 [10 Am. Dec. 193], and *Dubois v. Delaware and Hudson Canal Co.*, 4 Wend. 285, in which it seems to be maintained that a duly authorized agent is not to be affected by any personal responsibility, although no action could be maintained against the principal, upon the sealed instrument, if an action would otherwise lay against the principal.

Upon the doctrine of these two cases, it is remarked, in Story on Agency, sec. 278: "But it deserves consideration whether the doctrine can be generally maintained, that because the principal may be indirectly liable on the contract, therefore the agent is exonerated from all personal responsibility. Besides, it is manifest that the agents had here made a contract in their own names, although as a committee of the corporation, and the deed was their own, and not that of the corporation. The corporation, confessedly, could not be sued on that instrument as their deed; and it would seem to be a general rule that an agent who executes an instrument must execute it in the name of the principal, so as to give a right of action thereon against him if he would avoid personal responsibility; and if it be a contract by deed, then it must be in the name and be the deed of the principal, for if it be the deed of the agent, he alone is responsible thereon as the proper legal party to it."

After some further remark and illustrations, the text is concluded as follows: "Indeed, nothing is more common than for a contract to be made by which the agent is personally bound, and which yet is, *ex consequenti*, binding on the principal also, although the latter is not a direct and immediate party to the instrument. This is true, not only in the commercial law of England and America, but also in that of the foreign nations of continental Europe. The more correct and satisfactory doctrine would, therefore, seem to be, that when the agent is a direct party to the instrument, and the principal is not, so that the latter is not, *ex directo*, suable thereon, there the agent, although he describes himself as agent, is suable upon the covenants and agreements contained therein, as his own personal contract. Still,

however, the doctrine is to be understood with the qualification that in the instrument there are apt words to charge the agent personally."

In note 6 to section 279, in the fifth edition of the work, it is said that these two cases on this point are not easily to be reconciled with many other authorities, which are cited at great length. And in the case of *Hopkins v. Mehaffy*, 11 Serg. & R. 126, 129, Mr. Justice Gibson, after laying down the law upon this point as we have found it to be, proceeds to remark: "It is somewhat remarkable that the distinction between a parol and a sealed contract was not taken in *Randall v. Van Vechten*, *supra*, and that the authorities cited to prove that an agent who personally covenants in behalf of his principal is liable only in the event of their being no recourse to the principal, directly prove the reverse." See also divers other authorities to the same effect, in note 2 to section 273, Story on Agency.

The result is, that in our opinion the covenant in question is the personal covenant of the defendants below, and that the court erred in sustaining the demurrer. The judgment will therefore be reversed, and the cause remanded with instructions to overrule the demurrer and proceed with the cause.

AGENT MAY BIND HIMSELF PERSONALLY WHILE CONTRACTING AS SUCH: *Pitman v. Kintner*, 33 Am. Dec. 469; *Simonds v. Heard*, 34 Id. 41, and note; *Ogden v. Raymond*, 58 Id. 429; *Davis v. Burnett*, 67 Id. 263; but the principal may also, in general, be sued: See *Violett v. Powell's Adm'rs*, 52 Id. 546, and note collecting other cases. As to when a principal is liable on negotiable paper, see *Bank of British North America v. Hooper*, 66 Id. 390, and note; note to *Eastern R. R. v. Benedict*, Id. 389. An agent is not personally liable when acting in the name of his principal and within the scope of his authority: *Simonds v. Heard*, *supra*; *Hall v. Huntoon*, 44 Id. 332.

AGENT IS ALONE LIABLE ON SEALED INSTRUMENT made in his own name; the principal is not bound: See *Hale v. Woods*, 34 Am. Dec. 176, and note collecting prior cases; *Brinley v. Mann*, 48 Id. 669; *Fisher v. Salmon*, 54 Id. 297.

OVERTON v. BEAVERS.

[19 ARKANSAS, 623.]

GUARDIAN IS NOT PERSONALLY LIABLE ON CONTRACTS OF WARD without an express undertaking in writing to that effect.

GUARDIAN IS NOT LIABLE, EITHER PERSONALLY OR IN FIDUCIARY CHARACTER, FOR NECESSARIES furnished his ward without his consent, express or implied.

GUARDIAN'S POWERS, AUTHORITY, AND DUTIES CEASE WHEN WARD ATTAINS AGE OF MAJORITY, but the consequences and responsibilities of the relation may continue.

GUARDIAN'S HAVING PAID WARD'S BOARD AND TUITION ON FORMER OCCASION DOES NOT MAKE HIM RESPONSIBLE, by implication, for board furnished the ward without his consent or authority.

ASSUMPSIT. The facts are stated in the opinion.

Watkins and Gallagher, for the plaintiff.

Williams and Williams, for the defendant.

By Court, HANLY, J. This was *assumpsit* brought by the plaintiff against the defendant in the Saline circuit court. The declaration contains five counts, as follows: 1. That the defendant, being the guardian, etc., of one Benjamin Newbern, an infant, was indebted to the plaintiff in the sum of two hundred dollars for board and lodging furnished by the plaintiff, at the request of the defendant, for the ward, Newbern, and being so indebted, the defendant undertook and promised, etc.; 2. That the defendant, in consideration that the plaintiff, at the like special instance and request of the defendant (being guardian as in the first count stated), had found and provided other board and lodging to his ward, Newbern, he, the defendant, undertook and then and there promised to pay the plaintiff so much therefor as he reasonably deserved to have, etc.; 3. That the defendant was indebted to the plaintiff in the further sum of two hundred dollars for board and lodging before that time found and provided by the plaintiff at the special instance and request of defendant, for one Newbern, etc.; 4. That defendant was indebted to the plaintiff in the further sum of two hundred dollars for board and lodging found and provided by the plaintiff for the defendant, etc.; 5. An account stated.

The defendant interposed the general issue, with leave by consent, to introduce all special matter in evidence, as if specially pleaded. By consent, the issue thus formed was submitted to the court sitting as a jury, on substantially the following facts: The defendant was the guardian of Benjamin Newbern, an infant under the age of twenty-one years, during the year 1855, and to the ninth of January, 1856, when he attained his majority and became of full age; that plaintiff was the uncle by marriage of Newbern, and resided in Arkadelphia, in Clark county, whilst the defendant was a resident of Saline county, and derived his appointment as a guardian from the probate court of that county. That some short time before Newbern, the defendant's ward, commenced to board with plaintiff, he accompanied a son of the plaintiff to his residence in Arkadelphia, and during his stay there the plaintiff said to Newbern if he would come and go to

school he would not charge him anything for his board. That, under this promise, Newbern returned to Arkadelphia, and commenced to board with plaintiff, and continued to board with him for the space of about ten months. That when defendant heard that his ward, Newbern, was boarding with plaintiff, he objected to it, saying that he and plaintiff were not friendly, but made no efforts, as far as the proof shows, to prevent his ward from continuing to board at plaintiff's. That Newbern had been at Arkadelphia at school before, and that defendant, as his guardian, had paid his board and tuition during the time, and also his tuition during the time he boarded with plaintiff. That board per month was worth ten dollars during the time Newbern boarded with plaintiff. That in January, 1856, the defendant made his final settlement of his guardianship of Newbern with the probate court of Saline county, his ward having attained his majority on the ninth of that month, as before stated. That in that settlement a balance was struck against him, defendant, of one thousand five hundred and ninety-two dollars and sixty-one cents. That in this settlement no charge was made against the ward for board at plaintiff's, and no credit was given him therefor. The suit was commenced to the March term of the Saline circuit court, 1856, and the trial thereof was had at the October term following.

On these facts the court below was asked by the defendant to declare the law to be as applicable to them as follows: 1. That a guardian is not liable in his private or individual capacity, on the contract of or for necessities furnished his ward, unless there is an express promise in writing by the guardian; 2. That the liability of a guardian is only in his representative capacity as guardian, and ceases when the party ceases to be such guardian; 3. That a guardian ceases to be such when his ward arrives at full age and he has made final settlement.

The court, against the objections of the plaintiff, sustained these propositions, and declared the same to be the law as applicable to the above facts, and thereupon gave a verdict, and ordered judgment to be entered thereon in favor of the defendant. To which judgment, opinion, and proceeding of the court the plaintiff, by his attorney, excepted at the time.

To try the validity of his exception, the plaintiff sued out a writ of error to the circuit court of Saline county, and it is upon the return of this that the cause is now in this court.

We will state the proposition stated by the court below, *seriatim*.

1. The first proposition should be considered by the court under two inquiries, that is to say: *a.* Is a guardian personally liable on the contracts of his ward, without an express undertaking in writing to that effect? and, *b.* Is a guardian personally liable for necessities furnished his ward without an express promise in writing on his part to pay for the same?

a. As to this question, we see no good reason why the relation of guardian and ward should operate to render the former liable on the contracts of the latter more readily than in cases where no such relation existed. The only effect that the existence of that relation could have on contracts entered into on the part of the ward might be to raise by implication a consideration to support an express promise by the guardian for his ward, where no consideration is expressed on the face of the undertaking of the guardian. A guardian would be no more liable on the contracts of his ward than he would be on those of an entire stranger. In either case, to be rendered liable under the statute of frauds, Dig., c. 73, sec. 1, it would be necessary that the undertaking should be in writing: See 1 Parsons on Cont. 116; 2 Id. 300 et seq.

b. A guardian is not responsible, either personally or in his fiduciary character, for necessities furnished his ward without his consent, express or implied: See 1 Parsons on Cont. 116; *Forster v. Fuller*, 6 Mass. 58; *Edmunds v. Davis*, 1 Hill (S. C.), 279; *Call v. Ward*, 4 Watts & S. 118 [39 Am. Dec. 64].

The case of *Edmunds v. Davis*, *supra*, is very similar in its facts to the one we are considering. In that the court say: "The defendant's ward had no authority to bind him by express contract. The board and tuition were furnished the ward at his request alone, and if the plaintiff has suffered loss, it was the consequence of a confidence reposed in the ward, which he cannot visit upon the defendant." And again, the court in the same case say: "Is the guardian liable for necessities furnished the ward in respect to his fortune which he may have in his possession? If a guardian should willfully withhold from his ward necessities suited to his fortune and condition in life, equity would compel him to supply them; and if a stranger *ad interim* should furnish them, he would probably be reimbursed by the court of chancery, out of the infant's fortune."

In *Call v. Ward*, *supra*, the court, by Rogers, J., said: "But it may be asked, what is to be done when the guardian refuses to furnish necessities to his ward? Miserable indeed would be his condition if he might run the risk of starvation with a plen-

will dismiss the guardian for neglect of duty, or the infant may himself purchase necessities; or if of such a tender age that he cannot contract himself, a third person may supply his wants. But then the guardian is not liable, but the infant. In that case suit must be brought against the infant, who can appear by guardian, and not against the guardian himself; and the judgment, when rendered, is against the infant, and execution can only be had of the estate of the infant:" See also 1 Parsons on Cont. 244 et seq.

2. It is true that the general liabilities of a guardian, as such, only continue so long as he continues to be guardian. But there are many liabilities which a guardian may incur, whilst acting in that capacity, which subsist after he ceases to be guardian. A guardian may make his infant ward his agent to contract for him, and thereby incur personal responsibility respecting his guardianship which will subsist after the expiration of his term. He may also incur responsibility by an implied authority to his ward to contract debts in his name; in which case he would be personally responsible, though he had never received a dollar of his ward's into his hands, and this liability would subsist after the expiration of his term of guardianship, and this on the principle of agency. It may be said, therefore, that the announcement of the second proposition by the court, though warranted by the facts shown by the record, could not be sustained as a general principle or as a correct enunciation of the law applicable in all cases.

3. We presume this proposition is not and cannot be controverted. The powers, authority, and duties of a guardian cease when his ward attains the age of majority. The consequences and responsibilities of the relation may continue, as we have already shown. The court from which he derived his appointment may retain jurisdiction over him to compel him to account, and settle his administration as guardian after his ward has attained his majority. But this is a matter only between him and the court, and the jurisdiction only subsists for a special purpose. So far as third persons are concerned, the guardian, as guardian, is *functus officio* when his ward attains his majority. If he has incurred any liability, or entered into a contract on account of his ward, whilst his relation as guardian existed, he is, notwithstanding his ward's majority, liable on his contract personally, and this though he may not have ever had a dollar in his hands belonging to his ward. See *Simms v*

Norris, 5 Ala. 42; *Clark v. Casler*, 1 Ind. 243; *Forster v. Fuller*, 6 Mass. 58.

4. But apart from the foregoing views and considerations, we are clearly of opinion that though the court may have erred in the enunciation of the law as applicable to the state of facts shown by the record in this case (which we do not concede), yet on the whole case the finding of the court was right on the law and the evidence. There is no evidence whatever tending to prove that the defendant put the ward, Newbern, with the plaintiff to board. There is no evidence tending to prove that the defendant authorized Newbern to contract for him with reference to his board, either with the plaintiff or any one else. The fact that defendant paid for the board and tuition of Newbern on a former occasion does not by implication make him responsible for his board in the instance at bar. See *Prescott v. Cass*, 9 N. H. 93.

The remarks of Johnson, J., in *Edmunds v. Davis*, 1 Hill (S. C.), 279, are so *apropos* to this point that we feel warranted in transcribing them here as expressing our views as fully as they could be expressed by any language of our own. The judge said: "It is said that the defendant knew that his ward made this engagement, and did not give notice of his dissent. The plaintiff ought to have known that the ward had no authority to bind his guardian by his contract. He ought not to have contracted with him without his assent; without it he could not know that he was not deranging all the plans which the guardian had projected for the advancement of his ward, or that he was not seducing him, by the facilities which he afforded, into an expense not justified by his fortune and rank in life; and on the other hand, the defendant could not know that the plaintiff had not contracted with the ward, trusting to his own responsibility; and in whatever view the matter is put, the probable inferences are against the plaintiff. On principle, the case is clearly against the plaintiff; a guardian is not personally bound by the contract of his ward even for necessities; nor have I been able to find a case or *dictum* which charges him on a promise raised by implication, from the circumstance that he did not give notice of his dissent."

In the case at bar the proof is quite potent that the plaintiff had agreed with the ward, Newbern, that he would not charge for his board—that it was the agreement that the board should be gratuitously bestowed by the uncle upon his nephew; so that

in no event could the plaintiff recover, whether against the defendant or his ward.

We therefore, without hesitation, affirm the judgment of the court below in this behalf rendered.

GUARDIAN IS NOT LIABLE FOR NECESSARIES FURNISHED WARD without his consent: *Call v. Ward*, 39 Am. Dec. 64; note to *Guion v. Guion's Adm'r*, 57 Id. 227.

GUARDIAN CANNOT DISAFFIRM CONTRACT MADE BY INFANT WARD, which is for the benefit of the latter: *Oliver v. Houdlet*, 7 Am. Dec. 134.

CHANCERY GUARDIAN CONTINUES UNTIL MAJORITY OF INFANT: Note to *Thompson v. Boardman*, 18 Am. Dec. 690. The office of the guardian is for the whole minority of the ward, unless it is expressly for a shorter period, or unless subsequently shortened by an order of removal: *Jones v. Hays*, 44 Id. 78.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

BIRD *v.* LISBROS.

[9 CALIFORNIA, 1.]

PRIOR POSSESSION IS EVIDENCE OF TITLE, and this evidence may be destroyed by abandonment.

RULE THAT MERE TRESPASSER CANNOT SHOW TITLE IN THIRD PARTY is generally true, but not universally so. It is true when plaintiff relies on prior possession for his title.

DEFENDANT IN POSSESSION MAY SHOW TITLE IN THIRD PARTY, where he has a *prima facie* title, and the plaintiff relies on his strict legal title.

DEFENDANT MAY SHOW ABANDONMENT BY PLAINTIFF'S GRANTOR prior to his conveyance to plaintiff, where plaintiff relies solely on his grantor's possession for title.

TO MAINTAIN EJECTMENT UNDER PRIOR POSSESSION, plaintiff need not show such possession in himself.

EJECTMENT. Plaintiff claimed title by virtue of prior possession, and also through deeds of conveyance. The opinion states the facts necessary to an understanding of the points involved.

Robinson, Beatty, and Botts, for the appellant.

Joseph N. Lewis, for the respondent.

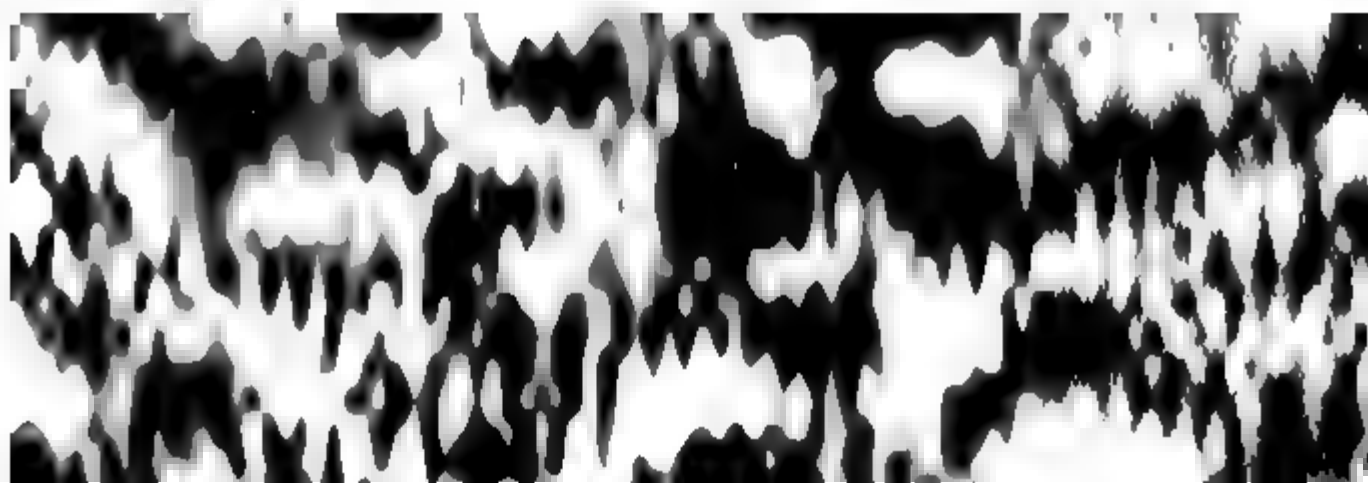
By Court, BURNETT, J. This was an action to recover the possession of premises situated upon public land. On the trial of the cause in the court below, the counsel of defendant asked the witness, Ralph Bird, the plaintiff's grantor, "whether he had not relinquished and abandoned all his right to one Richardson in July, 1855, and whether Richardson had not taken possession of the premises by virtue of that relinquishment."

In the case of *McArthur v. Hughes*, 1 Cal. 200, it was said: "The prior possession of Williams, the plaintiff's grantor, was sufficient to maintain a recovery in ejectment." And in the opinion of the court in the same case, it was also said: "The fair deduction from the record is, that at that period the tenancy of Palmer ceased, and consequently Williams was entitled to possession, and the acts of Shattuck as his agent removes any idea of his abandonment of the premises." And in the case of *Bequet v. Caulfield*, 4 Cal. 278 [60 Am. Dec. 615], the learned judge who delivered the opinion of the court said: "We have often held that possession is evidence of title; but it is equally true that possession gives a right of action against a mere trespasser, even when title may be shown to exist in another. So where a party can show nothing but a prior possession, that reliance may fail if it be shown that he voluntarily abandoned his possession without the purpose of returning."

In these cases it is clearly held that prior possession is evidence of title, and that this evidence may be destroyed by abandonment. And it would seem to be clear that if a party can acquire a title by possession he may destroy it by abandonment. If, however, the possession were continued for a period corresponding with the statute of limitations, then it might admit of great doubt whether the party could destroy the evidence of his title by simple abandonment.

But the question in this case is, whether the defendant, not having connected himself with Richardson's title, and not having shown that the plaintiff was aware of the alleged abandonment of his grantor, can be allowed to show his abandonment.

It was held in one of the cases cited that a mere trespasser cannot show title in a third party. This is no doubt true as a general proposition. But it is not of universal application. For example, we will suppose A has the true title, but not the actual possession of real estate, and B takes possession, and C then ousts B of his possession. In a suit by B to recover possession from C, the latter cannot set up in bar the outstanding title of A. The possession of C gives him a *prima facie* title; but the prior possession of B proves superior to this *prima facie* title of C. If it were otherwise, and a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title outstanding in a third person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. In the case supposed.



were this the rule, C could turn out B and justify; and D for the same reason could in turn oust C. The true owner not being disposed to assert his superior title, there could be no repose obtained by the several trespassers as between themselves.

But when the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession, having a good *prima facie* right, may set up and show the true title to be in another party. By showing this fact, he proves that the plaintiff had no title with which to overcome that which the law presumes to exist in the defendant by virtue of his actual possession.

But this case presents a different question. The defendant did not simply offer to show that there was a superior outstanding title in a third party, but that the grantor of plaintiff, by his own act, had abandoned the premises, and thus destroyed the only evidence of his title. In ejectment the plaintiff must show title in himself as against the defendant. But when he fails to show any title in himself, he must fail. Suppose that the defendant had proved that Ralph Bird had previously conveyed the property in controversy to another party. He certainly could have done so, and this would have defeated the plaintiff's action. And if he could have shown that no title was in plaintiff because of this act of his grantor, he must be allowed to show that by the act of Ralph Bird in abandoning the premises there was no title in the plaintiff. In the case of *Bird v. Dennison*, 7 Cal. 267, it was substantially held that when a party relied upon possession, whether of himself or his grantors, as his sole evidence of title, he must be held to know the acts of those through whom he claims; and that the actual adverse possession of a party at the time the deed was made was notice to the purchaser. The purchaser is bound to know the chain of title through which he claims; and if that chain only leads him back to the possession of his grantors, and the period of that possession is short of the time fixed by the statute of limitations, he must be held responsible for all the acts of those through whom he claims. All his evidence of title rests upon the acts of his grantors; and if he claims the benefit of some of their acts, he must share the responsibility of those that may be against him, when another party is, at the time of his purchase, in the actual adverse possession of the premises.

If these views be correct, the question was proper, and should have been allowed. It did not matter whether the defendant claimed under Richardson or not; Ralph Bird, as alleged, hav-

ing by his own act destroyed all evidence of title, had no title to convey to the plaintiff; and as the premises were, at the date of the deed, in the adverse actual possession of others, the plaintiff had notice and purchased at his peril.

It is insisted by the defendant that to maintain ejectment under prior possession the plaintiff must show such possession in himself; that possession is mere evidence of title; but is not title itself, and therefore cannot be conveyed to another.

But the answer to this objection is very simple. Possession is evidence of title; and the party in possession is therefore deemed, in law, to be the owner; and when he conveys the land to another, he is deemed, in law, not to convey his evidence of title, but the title itself, of which the law, by reason of such evidence, adjudges him the owner, as against all others not having a superior title. This point was decided by this court in the case of *McMinn v. Mayes*, already cited.

The judgment of the court below should be reversed, and the cause remanded for further proceedings.

TERRY, C. J., concurred.

PRIOR POSSESSION AS EVIDENCE OF TITLE, whether for statutory period or for less: See note to *Plume v. Seward*, 60 Am. Dec. 601, where the subject is discussed at length; *Pratt v. Phillips*, Id. 162; *Hutchinson v. Perley*, Id. 578; *Bequette v. Caulfield*, Id. 615; *Winans v. Christy*, Id. 597.

PLAINTIFF MUST RECOVER ON THE STRENGTH OF HIS OWN TITLE, either as being good against the world, or good against the defendant: *Clark v. Diggs*, 44 Am. Dec. 73; *Wolfe v. Dowell*, 51 Id. 147; and if he is out of possession, he cannot recover on the ground that the tenant in possession holds by a void title: *Reynolds v. Ingersoll*, 49 Id. 57.

WHERE A PARTY RELIES SOLELY ON PRIOR POSSESSION for title in ejectment suit, that reliance may fail, if it be shown that he voluntarily abandoned his possession without the purpose of returning: *Bequette v. Caulfield*, 60 Am. Dec. 615, and note.

THE PRINCIPAL CASE IS CITED in *Piercy v. Sabin*, 10 Cal. 30; *Hubbard v. Barry*, 21 Id. 325; *Dyson v. Bradshaw*, 23 Id. 536; *Richardson v. McNulty*, 24 Id. 348; *Harris v. McGregor*, 29 Id. 129; and *Bradley v. Lee*, 38 Id. 370, to the point that in an action to recover real estate, brought solely on the prior possession of the plaintiff, a defendant who is a mere trespasser cannot justify his act by showing the true title to be in a third person; in *Partridge v. McKinney*, 10 Id. 183, to the point that possession is evidence of title; and in *Mallet v. Uncle Sam Gold and Silver Mining Company*, 1 Nev. 202, and *Partridge v. McKinney*, 10 Cal. 183, to the point that defendant may show abandonment by the plaintiff or his grantors in an action of ejectment.

HUMPHREYS v. McCALL.

[9 CALIFORNIA, 59.]

DENIAL "FOR WANT OF INFORMATION TO ENABLE THEM TO ADMIT," etc., is not sufficient where both complaint and answer are verified.

DENIAL OF FACTS PRESUMPTIVELY WITHIN DEFENDANT'S KNOWLEDGE must be in the positive form, and not on information and belief.

DENIAL OF FACTS PRESUMPTIVELY BASED ON INFORMATION need be only according to defendant's information and belief, but it must be according to both information and belief.

DEFENDANT MUST ANSWER ACCORDING TO HIS BELIEF, and is precluded from controverting the alleged fact which he believes, though his belief may be founded upon mere hearsay, general report, or other information.

IN ACTION FOR DAMAGES FOR DIVERSION OF WATER defendants in possession cannot prove an older and better title in third persons, unless such persons are made parties, and the facts specially set up.

FAILURE TO ASSERT PARAMOUNT TITLE INURES TO BENEFIT of him who holds the oldest *prima facie* title.

PARTY HAVING ACTUAL PRIOR POSSESSION MAY RECOVER POSSESSION from second possessor when both claim only by possession, and the suit is between the two parties only.

ACTION to recover damages for diversion of water. The opinion sufficiently states the facts.

Robinson and Beatty, for the appellants.

Heydenfeldt, for the respondents.

By Court, BURNETT, J. This was an action to recover damages for the diversion of water from the ditch of plaintiffs, and to enjoin defendants from continuing the nuisance. The plaintiffs had judgment in the court below, and the defendants appealed.

1. The first error assigned by defendants is, that the court below erred in overruling defendants' motion for a nonsuit. This objection we think not well taken. The evidence was sufficient to go to a jury.

2. The second error assigned is, that the court erred in permitting parol evidence of the contents of the deed from Cooper to plaintiffs' immediate grantors without accounting for the non-production of the instrument. In answer to this objection, the counsel of plaintiffs insist that the fact was not denied in the answer. The complaint and answer were both verified. In the complaint it was alleged that Thomas Cooper and others constructed the ditch, and that "on the tenth day of October, 1855, and for a long time previous thereto, Charles H. Everett, John A. Head, and James M. Dean were the owners and suc-

and to the said Georgia Ditch." This allegation of the complaint is met by the defendants in their answer by this denial: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia Ditch to them, the said plaintiffs, as alleged in their said complaint."

In case the complaint be verified, the answer must contain a specific denial to each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief; and every allegation not so denied shall, for the purpose of the action, be taken as true: Secs. 46, 65.

The only consequence resulting from the failure of defendants to properly deny a particular allegation of the complaint is that the allegation shall be taken as true. No motion to set aside the answer is required, but it is held simply void, and raises no issue.

When the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer upon information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, of the defendant is presumptively based upon information, he is not bound to deny positively, but only "according to his information and belief." In this case, the transfer from Cooper was the act of a third party; and unless it had been expressly alleged in the complaint that defendants knew that fact of their own knowledge, they could only be required to answer according to information and belief. But the defendant in such case must answer according to both his information and belief. The answer in this case says nothing about the belief of the defendants. It does not deny that defendants had any information, but simply avers a want of information to enable them to admit, not believe, the alleged fact. The object of the statute is to sift the conscience of the defendant and obtain from him his belief. He must answer according to his belief, whether that belief be founded upon sufficient or insufficient information. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information. There is a clear distinction between positive knowledge and mere belief, and they cannot both exist together.

The defendant can know what is his belief, and can, therefore, state it. This belief may be founded upon the statements of

others, not competent witnesses, and not under oath, and not, therefore, legal testimony to prove the fact in court if denied. Yet if the defendant has formed a belief of the fact from this incompetent testimony, he must state it. In making out his answer, he cannot undertake to decide whether the information upon which his belief is founded was legal testimony or otherwise. He must state facts only, and the fact of his belief is the only matter known to him. If permitted to judge as to the legal competency of the information upon which his actual belief is founded, then the object of the statute in requiring him to answer according to his belief would be defeated.

The only object in requiring the defendant to state his belief is to dispense with the necessity of proof on the part of the plaintiff. If, then, he admits that he believes the fact to be true, the fact stands as confessed. The clear result of this provision of our statute is conceived to be this, that the defendant must state his actual belief, whether founded upon mere hearsay evidence, general report, or other information; and when he does so state it, he is precluded from controverting the alleged fact which he believes but does not know to exist. The practical result is, that the plaintiff may establish the existence of a fact, not known to the defendant, by the defendant's mere belief based upon incompetent evidence. The statute changes the law of evidence in favor of the plaintiff and against the defendant. It permits the plaintiff to verify his complaint; and then the defendant is compelled to state his belief as to facts he does not know to exist. And when those facts (unknown to the defendant) are alleged and sworn to by the plaintiff, upon his own knowledge, the defendant is compelled either to believe them to be true or to believe the plaintiff guilty of perjury.

Under the construction we are compelled to give the statute to make it practically operative, the answer contained no proper denial of the alleged fact. The rule is a hard one, but the remedy must be sought elsewhere. While the defendant is compelled to answer every material allegation in the complaint, the plaintiff is not required to answer new matter set up by the defendant, but the same is deemed controverted without any denial. But we must administer the law as we find it. This provision of our practice act would seem to be a fruitful source of moral if not of legal perjury.

3. The third assignment of error depended upon the second and is already disposed of.

4. The fourth, fifth, and sixth assignments of error are substantially the same, and may be all considered together. The defendants offered to prove that there was an older and better right to the water in Spencer and Benson, and that they had brought a suit against defendants for the diversion of the same water. This proof was refused by the court, and the defendants excepted.

This defense was not affirmatively set up in the answer. The plaintiffs, under the issues made by the pleadings, were only bound to establish a better right than the defendants. This they did, by proving a prior appropriation of the water by them. The simple denial by the defendants of all right in the plaintiffs only put in issue the right of the plaintiffs to recover as against the defendants. The defendants, being in the actual possession and use of the water, had a good *prima facie* right to it; but when the plaintiffs proved a prior possession and use, they overcame this *prima facie* case of defendants. The *prima facie* case made out by the plaintiffs was of exactly the same character as that of the defendants, but it was prior, in point of time, and therefore as to it superior. If, then, the defendants wished to overcome the *prima facie* case of plaintiffs, by showing that they were not trespassers upon them, but upon an older and better right, if trespassers at all, they should have specially set up such matter, and made Spencer and Benson parties to the suit, by filing an answer in the nature of a cross-bill. A trespasser should not be held liable to pay the damages he has occasioned, except to the party rightfully entitled to them. But if he wishes to avoid a double responsibility as to the damages, he must bring the proper parties before the court. It may be that the holder of the true title may not wish to assert his right; and if he should not wish to assert his title, the defendant has no right to assert it for him. The failure to assert the paramount title must inure to the benefit of him who holds the oldest *prima facie* title. If any one acquires a title by adverse possession, it must be the party having the prior actual possession. The party having the prior actual possession is always entitled to recover the possession of the premises from the second possessor, when both claim only by possession, and the suit is only between the two parties.

Other points were alluded to in the oral argument before the court, but cannot be noticed, because not stated among the points on file.

Judgment affirmed.

THE PRINCIPAL CASE IS CITED in *San Francisco Gas Co. v. San Francisco*, 9 Cal. 473; *McCormick v. Bailey*, 10 Id. 232; *Ord v. Steamer Uncle Sam*, 13 Id. 371; *Vassault v. Austin*, 32 Id. 607; and *Davanay v. Eggenhoff*, 43 Id. 397, to the point that denials to verified complaint must be specific, and that denials merely on knowledge and information are insufficient.

RIGHTS OF DEFENDANT IN POSSESSION AGAINST ONE CLAIMING BY PRIOR POSSESSION: See *Bird v. Lisbroe*, *ante* p. 617, and note.

WHEN DEFENDANT MAY DENY ON INFORMATION AND BELIEF.—1. *Statutory Regulations*.—At common law, it was never allowable to set forth in the pleading that any facts were stated upon information and belief: *Truscott v. Dole*, 7 How. Pr. 222; but under the reformed procedure, the defendant, in some of the states, is allowed the privilege of making a denial “according to his information and belief,” or of denying “knowledge or information sufficient to form a belief.” Thus in North Carolina and Wisconsin the answer of the defendant must contain “a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief:” Code of North Carolina, sec. 243 (C. C. P., sec. 100); Overton’s Code of Practice, Wisconsin, p. 117, c. 125, sec. 10. In Minnesota and Indiana it is provided that the answer of the defendant shall contain simply “a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief:” Stats. of Minnesota, 1878, p. 720; Stats. of Indiana, Rev. of 1876, vol. 2, p. 60. In Oregon it is the same, except that the denial must be specific: Gen. Laws of Oregon, 1845–64, 156. In California, “if the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground:” Code Civ. Proc., sec. 437. Under section 128 of the New York code of civil procedure of 1848, it was provided that the answer of the defendant should contain, in respect to each allegation of the complaint controverted by the defendant, “a specific denial thereof, or of any knowledge thereof sufficient to form a belief.” This was so amended in 1849 that the denial might be either “general or specific,” or defendant might make “a denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief.” This section in the code of 1851 was as follows: “The answer of the defendant must contain a specific denial of each material allegation of the complaint, controverted by the defendant according to his knowledge, information, or belief, or of any knowledge or information thereof sufficient to form a belief.” It was again amended in 1852, providing that “the answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief:” See Voorhies’s N. Y. Code of 1852, p. 159, note. And this is the form in which that section now stands in that state: N. Y. Code Civ. Proc., 1877, sec. 500. This form of denial seems to be a creature of the statute, and subject to frequent statutory changes. This is notably the case in New York, as shown above. This form of denial also appears to be a necessity under a statute requiring the defendant to answer, under oath, the allegations contained in a verified complaint; and in many cases it is the only one which a defendant can conscientiously interpose to any or all of the allegations of the complaint. For example, when an action is brought upon an assigned demand, the de-

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defendant may be wholly ignorant of every proceeding relating to the transfer, and thus be unable to unqualifiedly deny the fact of the assignment, and at the same time may be unwilling to admit it. So where an action is brought against a principal upon a contract alleged to have been entered into in his behalf by a general agent, the defendant may be in a position in which he cannot truthfully deny all or any of the allegations of the complaint, for want of personal knowledge of the facts alleged, and yet may not be willing to admit the truth of facts sworn to by a person of whose very existence he was ignorant. In these, and in all other cases in which the defendant has no personal knowledge, or means of personal knowledge, of the truth of the matters alleged against him, a denial of all knowledge or information of such facts sufficient to form a belief is allowable and proper. But while the propriety of this form of denial is equally apparent whether the answer is verified or unverified, the necessity of its adoption is not so apparent in case of an unverified answer. Thus, in the state of Missouri and other code states, where pleadings do not have to be verified under oath, the defendant may specifically deny all the truthful allegations of the petition or complaint, "if he wants to plead a lie," and put the plaintiff to the proof of his whole case. Or he may state "that he has not knowledge or information thereof sufficient to form a belief," and thereby put the plaintiff to the proof, the same as if he had specifically denied such allegations: Green's Pl. & Pr., sec. 128; Mo. Code Civ. Proc., sec. 3521. In New York the provision allowing a denial of knowledge or information sufficient to form a belief formerly related exclusively to pleadings in courts of record, but this form of denial is now authorized in justices' courts by an act permitting the verification of pleadings in those courts: See 1 Laws of 1881, c. 414, sec. 2, p. 562; 1 Wait's Law and Practice, 178; 2 Id. 768; 3 Id. 328; *Dennison v. Carnahan*, 1 E. D. Smith, 144.

2. *When Denial of Any Knowledge or Information Sufficient to Form a Belief may Properly be Used.*—This form of answer is a mode of denial, where the party is ignorant of the fact alleged and cannot safely deny the allegation of the complaint, and is not bound to admit it, either in terms or by omitting to answer. And it is peculiarly proper under such circumstances, where the pleading is required to be verified, although the code in some states makes no distinction in this respect, whether it is or is not verified: *Snyder v. White*, 6 How. Pr. 324. The opinion of Harris, J., in *Edwards v. Lent*, 8 Id. 28, seems, on the whole, to give a clear and intelligible analysis of this whole subject. He says: "There are three forms in which a defendant may put in issue the allegations of the complaint. The first is, when the fact alleged is a matter within the personal knowledge of the defendant. The second is, when the matter alleged is not within the personal knowledge of the defendant, but relying upon his information, he either believes or does not believe the allegation to be true. The third is, when he has no such knowledge or information as will enable him to form a belief whether the allegation is true or not. These forms of pleading may not be indiscriminately adopted. If the matter alleged is such as must from its very nature be within the defendant's own personal knowledge, he cannot deny it upon information merely. If it be a matter in respect to which he has no personal knowledge, he must deny it upon his information, if he have such information as enables him to say he believes it to be untrue. When he is unable, either from his own knowledge or upon any information he has received, to say whether the allegation is true or not, he may say so, and this will be sufficient to put the allegation in issue. The answer will be insufficient if it denies merely upon

information an allegation the truth or falsity of ant's own knowledge. So, also, it will be insufficient if the defendant has not sufficient knowledge on the subject without referring to his information. It is only knowledge or information to enable him to form a belief, and to controvert an allegation under this provision of the code.

"Tested by these rules, those portions of the defendants' answers to strike out are obviously defective. When the defendants notice that the rate of insurance would be increased upon receiving such notice, they gave the plaintiff the complaint, are matters which must be within the knowledge of the defendants. They were bound, therefore, unless they positively deny them. It was, to say the least, incumbent upon the defendants to controvert these allegations by saying they had no knowledge to form a belief in respect to them. The portions of the answers to which the motion applies are defective in that instance the defendants state that they have no knowledge to form a belief, and therefore they controvert the allegations by only speaking of their want of knowledge. Before they can controvert an allegation, they must declare not only that they have no knowledge, but their want of information also. It may well be said that we could not say they had no sufficient knowledge or information to form a belief whether the allegations they were true or not. We have seen that it is only when there is no knowledge or information that this mode of answering is proper. It is then that the defendant may, either as to each of the allegations, or as to the allegation in the complaint, deny "any knowledge or information sufficient to form a belief." Such a denial is sufficient to make an issue, and oblige the plaintiff to sustain it by positive denial; and it is unnecessary to go further and deny the same." *Flood v. Reynolds*, 13 How. Pr. 304; *Duncan v. Lawrence*, 6 Id. 304; 8 C., 304; *Bushnell*, 7 How. Pr. 171; *Morrow v. Cougan*, 8 How. Pr. 346; *McMurray*, 15 Id. 346; *Temple v. Murray*, 6 How. Pr. 321; *Genesee Mutual Ins. Co. v. Moynihan*, 5 Id. 28; *McFurland v. Lester*, 23 Iowa, 280; *McP*. An answer to a material fact stated in the complaint, prescribed by the code, that is, of any knowledge or information sufficient to form a belief, makes a good issue, upon which the plaintiff may be affirmative, and which it is incumbent upon him to sustain. 55 How. Pr. 412; *Jackson Sharp Co. v. Holland*, 1 West Coast Rep. 687; *Livingston v. Hawaiian Ry Co. v. Oregon Ry & Nav. Co.*, 4 West Coast Rep. 687.

When the requirements of the code have been complied with, an additional statement that defendants "are entirely ignorant of the facts" does not render the denial afterwards made any less good. The denial may be coupled with a further statement that the defendants cannot be important, as long as the form prescribed by the code is directly complied with. And there can be no objection to the statement that the defendant has not any knowledge, or information, that it had no knowledge, etc.; for the latter equals the denial of the existence, on the part of the defendant,

information sufficient to form a belief: *Meehan v. Harlem Savings Bank*, 5 Hun, 439; *Nichols v. Jones*, 6 How. Pr. 355. So where defendants, in their answer, alleged want of knowledge or information sufficient to form a belief whether the property belonged to the plaintiff, and then set up an additional clause that the goods were delivered by the plaintiff to the defendants, and that defendants claimed to hold them as security for moneys advanced thereon by defendants, it was held that the first clause of itself formed a good issue, and that the second clause did not render the former one irrelevant: *Townsend v. Platt*, 3 Abb. Pr. 325; *Nichols v. Jones*, 6 How. Pr. 355. And if defendant interposes a specific denial absolutely to certain parts of the complaint, designating them, and of his own knowledge, and then interposes a general denial, on information and belief, of every other allegation in the complaint, the two denials do not conflict, and both are consistent with the code: *Blake v. Eldred*, 17 Abb. Pr. 240. A specific denial in the following form, "the defendant denies any knowledge or information thereof sufficient to form a belief as to the value of all or any of the said goods," raises a good issue as to value: *Ames v. First Div. St. Paul & Pac. R. R. Co.*, 12 Minn. 412. Where the defendant denies all knowledge or information as to the facts charged in the complaint, it is sufficient, although he says nothing as to his belief on the subject: *King v. Ray*, 11 Paige, 235; *Morris v. Parker*, 3 Johns. Ch. 296. It has been held that a want of belief is sufficient as a denial, and that it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief: *Treadwell v. Commissioners*, 11 Ohio St. 183. So, under the New York code of 1849, a denial upon belief alone was held to be sufficient: *Davis v. Potter*, 4 How. Pr. 155; and where the defendant denied all knowledge of a fact charged in the bill, but admitted his belief as to the facts charged, it was held unnecessary for him to deny any information on the subject: *Davis v. Mapes*, 2 Paige Ch. 105. If defendant has had information concerning the allegations in the bill, aside from the bill itself, he must state his belief in regard to such matters: *Devereaux v. Cooper*, 11 Vt. 103; *Utica Ins. Co. v. Lynch*, 3 Paige Ch. 210; *Smith v. Lasher*, 5 Johns. Ch. 247. But when a defendant answers that he has not any knowledge or information of a fact charged in the plaintiff's bill, he is not bound to declare his belief one way or the other. It is only when he states a fact upon information or hearsay that he is required to state his belief or unbelief: *Morris v. Parker*, 3 Id. 296; *King v. Ray*, 11 Paige Ch. 233; *Sloan v. Little*, 3 Paige, 103.

3. *When Denial of Any Knowledge or Information Sufficient to Form a Belief cannot be Properly Used.*—Although the denial of knowledge or information may be used in respect to every form of traverse, whether general or specific, yet it cannot be resorted to under all circumstances. There are occasions in which the defendant will not be permitted to say that he has no knowledge or information of the matter sufficient to form a belief, because such a statement would be a palpable falsehood, a plain impossibility. When the allegation in the complaint is of a fact which must of necessity be within the personal knowledge of the defendant; when it avers an act done or an omission suffered by him personally; when, for example, it states a contract entered into, or a deliberate wrong perpetrated by himself—he must necessarily know whether the averment is true or false. Consequently, in all cases, where the facts charged are within the knowledge of the defendant, he must answer positively, or the denial will be evasive; and if he fails to answer at all, the allegations of the complaint will be taken as true: *Capital Bank of Macon v. Rutherford*, 70 Ga. 57; *Hanna v. Barker*, 6 Col. 303; *Oregonian Ry*

Co. v. Oregon R'y & Nav. Co., 4 West Coast Rep. 548; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Curtis v. Richards*, Id. 33; *Wing v. Dugan*, 8 Bush, 583. Neither can a denial of knowledge or information sufficient to form a belief be interposed where, from all the circumstances of the case, the defendant is necessarily presumed to have knowledge of the allegations of the complaint, or, as it is sometimes expressed, when such allegations are "presumptively within the knowledge of the defendant:" *Capitol Bank of Macon v. Rutherford*, *supra*; *Palmer v. Yates*, 3 Sandf. 137; *Richardson v. Wilton*, 4 Id. 708; *Ketcham v. Zerega*, 1 E. D. Smith, 553; *Fales v. Hicks*, 12 How. Pr. 153; *Hanna v. Barker*, 6 Col. 303; *Humphreys v. McCall*, 9 Cal. 59; *San Francisco Gas Co. v. San Francisco*, Id. 453; *Lewis v. Acker*, 11 How. Pr. 163. Thus a party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact. When a party is pointed to the record of an instrument in the pleadings, he is not permitted to answer that he has no knowledge or information sufficient to form a belief whether there is such an instrument or not. Defendant has the privilege of consulting the public records, and it is intended that he shall inform himself upon the subject: *Goodell v. Blumer*, 41 Wis. 444; *Hathaway v. Baldwin*, 17 Id. 616; *Mills v. Town of Jefferson*, 20 Id. 50; *State v. McGarry*, 21 Wis. 496; *City of Milwaukee v. O'Sullivan*, 25 Id. 666; *Brown v. La Crosse City Gas Light & Coke Co.*, 21 Id. 51; *Elmore v. Hill*, 46 Id. 618; *Union Lumbering Co. v. Board of Supervisors*, 47 Id. 245. And a denial of knowledge or information sufficient to form a belief cannot be interposed, even to an allegation as to which the defendant is bound to make inquiries and inform himself before answer: *Hance v. Rumming*, 2 E. D. Smith, 48; *People v. McCumber*, 15 How. Pr. 186; S. C., 27 Barb. 632; 18 N. Y. 315; *Davis v. Mapes*, 2 Paige, 105; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Curtis v. Richards*, Id. 38. It has, however, been lately held in Oregon that a defendant is not bound to inform himself concerning the truth of an allegation of which he never had any knowledge, before answering the same; and that a denial of any knowledge or information thereof is a sufficient denial: *Oregonian R'y Co. v. Oregon R'y & Nav. Co.*, 4 West Coast Rep. 548. In that case it was further said that a party may, by the force of a statute, have constructive notice or knowledge of the existence and contents of a private writing duly admitted to record in a public registry, but there is no presumption that he has any actual knowledge or information on the subject unless it also appears that he had some connection with the transaction contained in the record, or relation to the proceeding out of which it grew. It was also said that a party is under no obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it positively, unless it be to recall and verify that knowledge or information of the matter which he once had and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstances: Id., 549, 550. In that case, also, the question of knowledge concerned the existence and contents of documents made and registered in Great Britain, and it may be that the rule there laid down, under the peculiar circumstances, is correct; but there is much reason for the position that when a party to a suit can obtain information by inspecting records and files which are within a convenient distance, or when he has other means of information within his power, such denial should be treated as a sham: *Heatherly v. Hadley*, 2 Or. 275; *Hance v. Rumming*, 2 E. D. Smith, 48; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. But it will not be so treated unless it ap-

pears that the party had the means of obtaining information directly within his reach: *Wesson v. Judd*, 1 Abb. Pr. 254. If from lapse of time or other circumstances defendant cannot admit or deny facts apparently within his knowledge, he must in his answer, or in the affidavit verifying it, set up such circumstances: *Richardson v. Wilton*, 4 Sandf. 708; *Ketcham v. Zerega*, 1 E. D. Smith, 553. It is bad pleading on the part of a corporation, or of a principal, to deny "knowledge or information sufficient to form a belief" of acts alleged to have been done by defendant's agent or partner: *Shearman v. N. Y. Central Mills*, 1 Abb. Pr. 187; *Lewis v. Acker*, 11 How. Pr. 163; *Chapman v. Palmer*, 12 Id. 37. Want of knowledge or information sufficient to form a belief as to whether the note sued on was at its maturity duly presented, and payment demanded and refused, is not a sufficient denial when the protest itself is on file, because that imports information, and if defendants refuse with that information to form a belief, their pertinacity in that regard cannot be allowed to operate to the prejudice of the plaintiff: *Huffaker v. National Bank of Monticello*, 12 Bush, 287; *Freeman v. Curran*, 1 Minn. 169. Allegation that defendant "does not know, of his information or otherwise, that the plaintiff had commenced the action in the complaint mentioned," is not a denial: *Sayre v. Cushing*, 7 Abb. Pr. 371. The denial of an immaterial allegation in the complaint is not sufficient to put the allegation at issue: *Freeman v. Curran*, 1 Minn. 169. And where it is impossible to distinguish the allegations denied upon knowledge from those denied from a want of knowledge or information sufficient to form a belief, the answer will be held insufficient: *Sheldon v. Sabin*, 4 N. Y. Civ. Proc. 9.

A denial of knowledge or information sufficient to form a belief whether facts or allegations in the complaint, taken conjunctively, are true, is also bad. It is neither a general nor specific denial, within the meaning of the code. If it be intended to deny all the allegations, it should be done disjunctively: *Young v. Catlett*, 6 Duer, 437, 443; *Hopkins v. Everett*, 6 How. Pr. 159. An answer denying, upon information and belief, a matter of public record is not sufficient to raise an issue: *City of Milwaukee v. O'Sullivan*, 25 Wis. 666. Thus, where a complaint avers the making of a deed, sets it out *in hæc verba*, and states the volume and page of the records where it is recorded, a denial in the answer of "sufficient knowledge or information to form a belief," as to these averments, is not sufficient to raise an issue: *Goodell v. Blumer*, 41 Id. 436. So, where a complaint against a corporation alleges facts necessarily within the knowledge of the officers of the corporation, or evidenced by the records and papers under their official control: *Mills v. Town of Jefferson*, 20 Id. 50. A defendant who admits that he executed an instrument upon which he is sued cannot deny information sufficient to form a belief as to facts stated in the instrument, but he is entitled to an inspection of the original to enable him to answer whether it is correctly set forth in the complaint: *Wesson v. Judd*, 1 Abb. Pr. 254; and he must answer as to all facts within his knowledge, or which he can ascertain from an inspection of books and papers in his possession or under his control: *Davis v. Mapes*, 2 Paige, 105. The defendant will be presumed to have notice of a judgment against him in the same court, and unless he gives some explanation, showing his good faith in the matter, and that his answer is not false or evasive, he will not be permitted to deny knowledge or information sufficient to form a belief concerning the same: *Ketcham v. Zerega*, 1 E. D. Smith, 553. Where a defendant wishes to rest his denial of the fact alleged upon his ignorance, he must aver that he has neither knowledge nor information sufficient to form a belief. The requirements of the code are not

satisfied by alleging a want of knowledge only sufficient to form a belief: *Id.*; *Edwards v. Lent*, 8 How. Pr. 28; *Norton v. Warner*, 3 Edw. Ch. 106; *Heye v. Bolles*, 33 How. Pr. 266; S. C., 2 Daly, 231; *Smith v. Lasher*, 5 Johns. Ch. 247; *contra*: *Sayre v. Cushing*, 7 Abb. Pr. 371, note; *McKenzie v. Washington Life Ins. Co.*, 2 Dia. 223. Nor is it sufficient for defendant to answer as to his want of information alone sufficient to form a belief: *Lloyd v. Burns*, 38 N. Y. Super. Ct. 423; *Edwards v. Lent*, 8 How. Pr. 28; *People v. McCumber*, 15 Id. 189; *Hautemann v. Gray*, 5 N. Y. Civ. Proc. 224, note; *Manny & Co. v. French*, 23 Iowa, 250. The denial must be of any knowledge as well as of any information: *Hautemann v. Gray*, *Edwards v. Lent*, *Heye v. Bolles*, *Smith v. Lasher*, *Manny & Co. v. French*, *Norton v. Warner*, *Lloyd v. Burns*, *supra*. An allegation that defendant is "not informed," and "cannot state," is not warranted by the code: *Elton v. Markham*, 20 Barb. 343; although under the old chancery practice defendant's answer that he "was utterly and entirely ignorant" was held sufficient: *Morris v. Parker*, 3 Johns. Ch. 296. But the allegation of a defendant, brought in by supplemental complaint, of his ignorance as to a fact admitted by the answer of the original defendant, to whose interest he has succeeded, does not put such fact in issue: *Forbes v. Waller*, 25 N. Y. 430; S. C., 25 How. Pr. 166; 4 Bosw. 475, *sub. nom.* *Forbes v. Logan*.

4. *When Denial upon Information and Belief may be Properly Used.*—Under the California code, the defendant must controvert the allegations of a verified complaint positively when the facts are within his personal knowledge, or when they are presumptively within his own knowledge. See principal case, and *Curtis v. Richards*, 9 Cal. 33; *San Francisco Gas Co. v. San Francisco*, Id. 453. But he may deny upon information and belief when the facts alleged in a verified complaint are not within his personal knowledge, or when they are not presumptively within his personal knowledge: *Id.* These are the two forms only in which the allegations of a verified complaint can be controverted in California so as to raise an issue, and a denial in any other form can have no legal effect. But a denial of the material averments of the complaint, upon information and belief, is sufficient to raise an issue to be tried, if the facts alleged are not within the personal knowledge of the answering defendant: *Roussin v. Stewart*, 33 Cal. 208; *Vassault v. Austin*, 32 Id. 597; *Jones v. City of Petaluma*, 36 Id. 230; *People v. Curtis*, 1 Idaho, 753; *Kitchen v. Wilson*, 80 N. C. 191; *Robbins v. Baker*, 2 Or. 52; *Strombridge v. City of Portland*, 8 Id. 67; *Wilson v. Allen*, 11 Id. 154; *Wadleigh v. Marathon Co. Bank*, 58 Wis. 546; *Maclay v. Sands*, 94 U. S. 586. Thus an administrator may so deny the execution and delivery of the deed of an intestate, referred to in the complaint: *Thompson v. Lynch*, 29 Cal. 189. But where a material fact stated in a verified complaint is denied upon information and belief, the answer should state how it happens that defendant is without knowledge as to the fact averred: *Brown v. Scott*, 25 Id. 189; *Vassault v. Austin*, 32 Id. 597. The recovery of a judgment is not presumptively within the knowledge of defendant, because a judgment in form is sometimes obtained without any knowledge of the defendant respecting it. But it is his duty to inform himself respecting it, so that he may be able to determine whether he can deny, in any form, the existence of the judgment described in the complaint, or whether he must admit it, either in terms or by implication from his silence. If he has received information about it, and believes it, he may predicate an answer upon such information and belief, denying that any such judgment was recovered: *Vassault v. Austin*, *supra*; see also *Curtis v. Richards*, 9 Cal. 38.

Under the California code, an allegation of the complaint can in no case be controverted by a denial of sufficient knowledge or information upon the subject to form a belief when the facts are presumptively within his knowledge: *Curtis v. Richards*, 9 Cal. 23; and an allegation of the death of plaintiff's ancestor, in a verified complaint, is not sufficiently controverted by an averment in the answer "that defendant has not sufficient knowledge to form a belief, and therefore neither admits nor denies:" *Anderson v. Parker*, 6 Id. 197. So in an action for a trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendant, the allegation of possession cannot be sufficiently traversed by defendant's averring in his answer that to the best of his information and belief he did not commit the grievance upon any land in the lawful possession of the plaintiff: *McCormick v. Bailey*, 10 Id. 227. A specific allegation of a contract in a verified complaint is not sufficiently controverted by an answer that defendant has no knowledge or information respecting the same, and therefore denies the same: *Ord v. Steamer Uncle Sam*, 13 Id. 369. So a denial, on information and belief, that a note sued on has not been paid, or that any sum of money is due on it, is clearly insufficient: *Hook v. White*, 35 Id. 299. The principle of these cases is, that where the facts stated in the complaint are within defendant's personal knowledge, or presumptively within his personal knowledge, he must answer positively, and not upon information and belief: *Curtis v. Richards*, 9 Id. 23; *San Francisco Gas Co. v. San Francisco*, Id. 453; *Brown v. Scott*, 25 Id. 189.

6. *Conflicting Decisions of New York concerning Denials upon Information and Belief.*—It was at one time doubted whether, under the code of New York, a denial could be made upon information and belief: *Hackett v. Richards*, 3 E. D. Smith, 13; S. C., 13 N. Y. 138; and there are cases holding that under that code a denial upon information and belief is no traverse, and is unauthorized: *Therasson v. McSpedon*, 2 Hill. 1; *Powers v. Home etc. R. R. Co.*, 3 Hun, 285; S. C., 5 Thomp. & C. 449; *Swinsburn v. Stockwell*, 58 How. Pr. 312; *Pratt Mfg. Co. v. Jordan Iron etc. Co.*, 6 N. Y. Civ. Proc. 372. In the case last cited it was said that the mode of answering prescribed by the code is clear and simple, and it was intended that it should be substantially followed. In other cases, however, it has been held that a defendant may deny upon information: *Metras v. Pearson*, 5 Abb. N. C. 90; *Stent v. Con. Nat. Bank*, Id. 86; *Sayre v. Cushing*, 7 Abb. Pr. 321, note; *Brotherton v. Downey*, 59 How. Pr. 206; S. C., 21 Hun, 436; *Henderson v. Manning*, 5 N. Y. Civ. Proc. 221; *Burley v. German Am. Bank*, Id. 172; *Macaulay v. Bromell etc. Printing Co.*, Id. 431. In the latter case it is held that a corporation may deny the allegations of a complaint in an action against it on information and belief. It must be observed that answering on information is not denying on information and belief: *Blake v. Eldred*, 18 How. Pr. 240. And the New York rule now is, that a party has no right to interpose an unqualified denial in a verified answer unless it be founded upon personal knowledge, and that where he has no positive knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted, but bound at his peril, to deny upon information and belief: *Brotherton v. Downey*, 21 Hun, 436; S. C., 59 How. Pr. 206. It was not the intention of the legislature to compel a party to admit an allegation that he is satisfied is false, but of which he has no knowledge, or else commit perjury by an absolute denial, or an allegation of want of information sufficient to form a belief: *Lidgerwood Mfg. Co. v. Baird*, 6 N. Y. Civ. Proc. 54. But a denial on informa-

tion and belief will not be permitted, where it appears by uncontradicted proof that the defendant must have personal knowledge of the allegations of the complaint which he denies "on information and belief:" *Sherman v. Boehm*, 7 Id. 34, and note thereto containing many collected cases.

7. *Rules of Pleading Applicable to Artificial Persons.*—The code makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons; and it imposes upon the defendant, if a natural person, and if a corporation upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in a verified complaint, to enable them to answer in the proper form: *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. A corporation may deny the allegations of a complaint in an action against it on information and belief: *Macauley v. Bromell etc. Printing Co.*, 5 N. Y. Civ. Proc. 431; *Wadleigh v. Marathon Co. Bank*, 58 Wis. 546. And in an action against a corporation, an answer which, "upon information and belief, denies each and every allegation of the complaint, except the allegation of the defendant's incorporation," creates a triable issue: *Macauley v. Bromell etc. Printing Co.*, *supra*. Where a complaint alleges the creation of a corporation according to law, either domestic or foreign, a simple allegation in the answer that the defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is a corporation or not, created by or under the laws referred to, is not sufficient to put the plaintiff upon proof of its corporate existence, where a statute requires the plaintiff's corporate character to be affirmatively denied: *Concordia Savings and Aid Ass'n v. Reed*, 93 N. Y. 474; *Crane Bros. Mfg. Co. v. Morse*, 49 Wis. 368; *Bengton v. Thingvalla Steamship Co.*, 3 N. Y. Civ. Proc. 263; S. C. affirmed, 4 Id. 260; 31 Hun, 96; *East River Bank v. Rogers*, 7 Bosw. 493. So where the corporation is defendant, and organized as above, an answer made in the name of the company, and verified by its president, denying knowledge or information sufficient to form a belief as to allegation concerning the existence of such corporation, will be treated as an admission of that fact: *Brown v. La Crosse City Gas Light & Coke Co.*, 21 Wis. 51. And this is because an allegation in an answer upon information and belief that a defendant is not and never was a corporation does not put in issue the incorporation of the defendant: *Bengton v. Thingvalla Steamship Co.*, *supra*. The party intending to raise the issue as to the existence of the incorporation should be held to a positive allegation to that effect, and this rule is peculiarly applicable where a company holding itself out to the world as a corporation denies its own existence: *Bengton v. Thingvalla Steamship Co.*, *supra*; *Jackson Sharp Co. v. Holland*, 14 Fla. 384. In an action against a corporation, an answer upon information and belief admitting that both plaintiff and defendant are corporations, and denying each and every allegation of the complaint, is frivolous, and creates no issue whatever: *Pratt Mfg. Co. v. Jordan Iron etc. Co.*, 5 N. Y. Civ. Proc. 372; S. C., 33 Hun, 143. A denial of any knowledge or information sufficient to form a belief as to matters of record is evasive, and does not raise an issue: *Mills v. Town of Jefferson*, 20 Wis. 50; *City of Milwaukee v. O'Sullivan*, Id. 666.

8. *Whether Exact Words of Statute must be Followed.*—It is not always necessary that a denial shall be in the exact words of the statute in order to raise an issue. Thus, in California, where the statute required the denial to be "according to his information and belief," the defendant's denial "on information and belief" was held to be sufficient to raise an issue: *Rousin v. Stewart*, 23 Cal. 211. So with a denial "upon information and belief:" *Vae*

whole, or a certain portion thereof; or a specific direct denial of particular allegations which are identified; or a direct denial of any knowledge or information sufficient to form a belief of the whole, or some specified portion of the complaint; but whichever mode is adopted must be a direct, positive, and explicit denial—a negation, not an allegation. The purpose of the provision in that code was to obtain a categorical issue, and to prevent raising issues by implication or inference, or by a comparison of counter-allegations and contradictory statements in the pleadings. Merely making a counter-statement, or giving a different version of the matter from that contained in the complaint, without in terms denying the allegations, is insufficient: *Powers v. Rome etc. R. R. Co.*, 3 Hun, 285; S. C., 5 Thomp. & C. 449.

10. *Effect of Shams and Frivolous Answers—Remedies.*—When there is no sufficient denial for the purposes of the action, the complaint is admitted: *Swinburne v. Stockwell*, 58 How. Pr. 312; *Powers v. Rome etc. R. R. Co.*, 3 Hun, 285; S. C., 5 Thomp. & C. 449; *Ord v. Steamer Uncle Sam*, 13 Cal. 369; *Brown v. La Crosse City Gas Light & Coke Co.*, 21 Wis. 51; *Brown v. Scott*, 25 Cal. 196; *Smith v. Woodruff*, 1 Handy, 276; *Therasson v. McSpedon*, 2 Hilt. 1; *Lloyd v. Burns*, 38 N. Y. Super. Ct. 423; *Wing v. Dugan*, 8 Bush, 583. This is sometimes the mandate of the code, but where no such provision exists, other remedies may be resorted to, as will be seen farther on. Facts set forth as a defense in an answer inconsistent with the complaint cannot be construed as a denial so as to prevent the allegations of the complaint from being taken as true: *Swinburne v. Stockwell*, *supra*. Sham and frivolous answers upon information and belief do not amount to a sufficient denial. It must be observed that a plain distinction exists in relation to sham and irrelevant answers and those which are frivolous. This distinction also exists as to the remedy to be applied to them. A sham answer is one that is false, and these words as applied to an answer are synonymous. Its essential element is falsity. A defense is sham, in the legal meaning of the term, which is so clearly false in fact that it does not in reality involve any matter of substantial litigation: *Nichols v. Jones*, 6 How. Pr. 355; *Thorn v. N. Y. Central Mills*, 10 Id. 19; *Leach v. Boynton*, 3 Abb. Pr. 1; *Thompson v. Erie R. R. Co.*, 45 N. Y. 468; *Morton v. Jackson*, 2 Minn. 219; *Davis v. Potter*, 4 How. Pr. 155.

A frivolous answer upon information and belief is one that does not contain any defense to any part of the plaintiff's cause of action; and its insufficiency as a defense must be so glaring that the court can determine it upon a bare inspection, without argument: *Leach v. Boynton*, 3 Abb. Pr. 1; *Hull v. Carter*, 83 N. C. 249; *McFarland v. Lester*, 23 Iowa, 261. A frivolous answer differs totally from a sham answer in this, that the one is always assumed to be true, and the other must always be proved to be false. One is always bad on its face; the other generally good. One is decided by inspection; the other on proof *aliunde*: *Nichols v. Jones*, 6 How. Pr. 358. If matters of defense can be shown to be clearly false or irrelevant, a motion to strike out will reach the evil; and this applies to false denials upon information and belief: *Nichols v. Jones*, *supra*; *Cahill v. Palmer*, 17 Abb. Pr. 196. There are cases holding it proper to entertain a motion to strike out an answer as sham when the pleadings have been sworn to: *Richter v. McMurray*, 15 Abb. Pr. 346, note; *People v. McCumber*, 18 N. Y. 315; S. C., 15 How. Pr. 186; *Blake v. Eldred*, 18 Id. 240; *Lawrence v. Derby*, 24 Id. 133; *Butterfield v. Macomber*, 22 Id. 150; and see remarks of Barculo, J., in *Nichols v. Jones*, *supra*. But there are authorities to the contrary: *Morton v. Jackson*, 2 Minn. 219; *Sherman v. Bushnell*, 7 How. Pr. 171; *Wingman v. Hicks*, 6 Abb. Pr.

ever, indicating good faith, are sufficient to prevent a verified answer from being stricken out as sham: *Munn v. Bureau*, 1 Abb. Pr. 281; S. C., 12 How. Pr. 543. There must be clear proof of its falsity, and a verified complaint is not such proof: *Kellogg v. Baker*, 15 Abb. Pr. 286. A denial of any knowledge or information respecting the allegations of the complaint is a sufficient denial, and will not be stricken out as sham unless it plainly appears that the same is false: *Oregonian Ry Co. v. Oregon Ry & Nav. Co.*, 4 West Coast Rep. 548; *Macaulay v. Bromell etc. Printing Co.*, 5 N. Y. Civ. Proc. 431; *Grocers' Bank v. O'Rourke*, 6 Hun, 18. But otherwise if the defendant have personal knowledge, etc.: *Sherman v. Boehm*, 7 N. Y. Civ. Proc. 34; *Hanco v. Running*, 2 E. D. Smith, 49. Sham and irrelevant answers, it appears, then, may be stricken out on motion: *Blake v. Eldred*, 18 How. Pr. 240; *Lawrence v. Derby*, 24 Id. 123; *People v. McCumber*, 27 Barb. 632; S. C., 18 N. Y. 315. The motion must, of course, be made on affidavit: *Livingston v. Hammer*, 7 Bow. 670; yet, where the defendant interposes an affidavit that the answer was put in in good faith, and not for delay, and makes an affidavit of merits, the motion to strike out his defense as sham should be denied: *Henderson v. Manning*, 5 N. Y. Civ. Proc. 221.

But this power of striking out should be cautiously exercised, for it disposes of the defendant's pleading in a very summary way, and may do him injustice, as it strikes his defense from the record. And yet if the answer, alleged to be sham, contain, as it may, matter which, if true, would constitute a defense to the action, he may obtain redress on appeal. If the answer does not involve the merits of the action, or affect a substantial right, it ought not to be permitted to stand. The policy of the code is to bring pleadings to the test of truth and substance. Hence sham and irrelevant defenses may be stricken out on motion, and frivolous defenses may be overruled and judgment given in a summary way: *People v. McCumber*, 27 Barb. 632; S. C. affirmed, 18 N. Y. 315; 15 How. Pr. 166; *Fleury v. Roper*, 9 Id. 215. The doctrine of these cases was, that a denial of knowledge or information sufficient to form a belief as to an allegation in the complaint concerning a matter necessarily within defendant's knowledge might be stricken out as sham; and even that a positive general denial might be thus stricken out, provided it was shown on affidavit that it was clearly false. These cases, however, were overruled by *Wayland v. Tyen*, 45 N. Y. 281; *Thompson v. Erie R. R. Co.*, Id. 468. These latter decisions are based on the ground that the granting of such a motion would be tantamount to denying the defendant's right to a trial by jury: and, on motion to strike out an answer as false or sham, have been followed by *Roby v. Hallock*, 5 Abb. N. C. 86; *Grocers' Bank v. O'Rourke*, 6 Hun, 18; but in *Kay v. Churchill*, 10 Abb. N. C. 83, and *Sherman v. Boehm*, 7 N. Y. Civ. Proc. 34, the doctrine of *Wayland v. Tyen* and *Thompson v. Erie R. R. Co.*, *supra*, has been distinguished and limited. For examples of frivolous answers, see *Kemish v. Selter*, 6 Abb. Pr. 226, and note thereto; *Pruitt Mfg. Co. v. Jordan Iron etc. Co.*, 5 N. Y. Civ. Proc. 373; *Powers v. Rome etc. R. R. Co.*, 3 Hun, 285; S. C., 5 Thomp. & C. 449; and for instances in which it was held improper to deem such answers, see *Davis v. Potter*, 4 How. Pr. 155; *Livingston v. Hammer*, 7 Bow. 670; *McFarland v. Lester*, 23 Iowa, 300. It was long the settled practice of the supreme court of New York to also strike out pleadings which were clearly "frivolous": *Temple v. Murray*, 6 How. Pr. 331. And answers on information and belief have been so stricken out: *Sherman v. N. Y. Central Mills*, 1 Abb. Pr. 187; *Chapman v. Palmer*, 12 How. Pr. 37;

Thorn v. N. Y. Central Mills, 10 Id. 19. But the doctrine of these cases was that the court must be well satisfied that such pleading was frivolous, and was interposed in bad faith for the purposes of delay or some other improper motive: *Temple v. Murray*, *supra*. The remedy now pursued, however, under the code of New York, is a motion for judgment on the ground of frivolousness, where the defense is palpably insufficient: *Nichols v. Jones*, 6 How. Pr. 358; *Blake v. Eldred*, 18 Id. 240; *People v. McCumber*, 27 Barb. 633; S. C., 18 N. Y. 315; *Powers v. Rome etc. R. R. Co.*, 3 Hun, 285; S. C., 5 Thomp. & C. 449. But judgment on a frivolous answer, under section 247 of the code, can be rendered only where the whole pleading is manifestly bad, and not where some of the defenses are frivolous and some good: *Grocers' Bank v. O'Rourke*, 6 Hun, 18; *Henderson v. Manning*, 5 N. Y. Civ. Proc. 221. In a proper case there is no objection to combining a motion for judgment on the ground of frivolousness and one to strike out as sham in one motion, and having the several defects remedied on a single application: *People v. McCumber*, 18 N. Y. 315; S. C., 27 Barb. 633. But on a motion to strike out a specified portion of an answer, and for further relief, etc., the plaintiff is not entitled to an order striking out the entire answer: *Mott v. Burnett*, 2 E. D. Smith, 50. A demurrer cannot be interposed to an answer on information and belief which sets up no new matter, but merely denies the allegations of the complaint, no matter how defective the form of the denial may be. It is not every defense to which a plaintiff may demur, but only to a defense consisting of new matter contained in the answer. The words of the code "consisting of new matter" are words of limitation: *Nichols v. Lumpkin*, 7 N. Y. Civ. Proc. 3, and authorities there cited; *Ketcham v. Zerega*, 1 E. D. Smith, 553.

11. *Effect of Verification, and Nature of Oath in Verified Pleadings.*—Section 524 of the New York code of civil procedure reads: "The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information." This section is new. See Throop's note in his annotations of the New York Code of Civil Procedure, 1877, page 223. Its object is to prove the conscience of the party: *Sheldon v. Sabin*, 4 N. Y. Civ. Proc. 9; and to settle a question with respect to which the authorities are exceedingly discordant. The cases relating to the proper mode of stating, in a pleading, allegations which are made upon information and belief, and the consequences of stating allegations in that way which are presumably within the parties' knowledge, are too numerous to be discussed, or even cited at length, in this note: See Throop's note, *supra*, and authorities there referred to. In the note just referred to, Mr. Throop says: "The verification should be made a substantial test of the knowledge and belief of the person verifying, who must be the party, except in the cases where convenience requires that an agent or attorney should be allowed to make the affidavit in his place; and in those cases an equally rigid test should be applied to him. Accordingly, this section requires a verified pleading to state, in terms, that the allegation is made upon information and belief of the party, in every case where it is not made upon the personal knowledge of the person verifying. This will enable an indictment for perjury to be maintained

upon a false allegation, irrespectively of the question whether the verification is made by the party or his agent or attorney; and will consequently tend to prevent false pleading, which is now of very frequent occurrence. In the present state of the authorities, the cases are rare where a conviction could be secured upon an indictment for the false verification of a pleading, either by the party or his agent or attorney, especially by the latter; and consequently, the necessity for verification is rarely a substantial impediment to falsehood where the person making it is not restrained by his own conscience." See also *Lidgerwood Mfg. Co. v. Baird*, 6 N. Y. Civ. Proc. 54. The verification can have no effect in determining the frivolousness of the answer: *Thorn v. N. Y. Central Mills*, 10 How. Pr. 19. The real issue on a motion for judgment on the answer as frivolous is, "Is the complaint true?" *Metras v. Pearcall*, 5 Abb. N. C. 90. If the defendant commits perjury in verifying an answer, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen, to prosecute those known to be guilty of perjury, they would effectually stop such an abuse: *Wayland v. Tyson*, 45 N. Y. 285.

ROBINSON v. MAGER.

[9 CALIFORNIA, 81.]

CONTRACT IS VOLUNTARY AND LAWFUL AGREEMENT by competent parties, for a good consideration, to do or not to do a specified thing.

OBLIGATION OF CONTRACT IS IMPAIRED if the end contemplated by it is substantially defeated. A dormant right that cannot be enforced is no right at all.

RIGHT AND REMEDY must stand or fall together; to deny the latter is to impair the former.

OBLIGATION OF CONTRACT MAY BE IMPAIRED without being entirely destroyed. It is impaired if conditions are exacted which did not exist when it was entered into.

STATUTE REQUIRING HOLDER OF COUNTY WARRANT to present it to the auditor for registry before a day named, or be forever barred from enforcing payment, is unconstitutional.

APPLICATION for writ of mandate, which was denied. The facts are stated by the court.

Robinson, Beatty, and Botts, in propria personas

S. W. Brockway, for the respondent.

By Court, BURNETT, J. This was an application to the district court for a *mandamus* to compel the defendant, as treasurer of Calaveras county, to pay an auditor's warrant, issued as evidence of county indebtedness before the passage of the act of the legislature of May 11, 1854, dividing that county and organizing the county of Amador. The subsequent act of the legislature, approved April 27, 1855, provided that "all persons holding

orders or warrants upon the treasurer of Calaveras county, issued prior to the time of the organization of Amador county, . . . shall present the same to the auditor of Calaveras county for registry on or before the first day of July, 1855;" and in case any such person should fail to so present his claim, he should be forever thereafter barred from enforcing the payment thereof, and the same should be deemed canceled. The warrant in this case was issued to the county judge for one quarter's salary, and came to the plaintiffs by purchase. The warrant was presented within the time limited to the auditor, not at his office, but at the bar-room of a public hotel. The auditor received the warrant, promised to register it, and then placed it with the barkeeper for safe custody, where it remained until after the expiration of the time mentioned in the act, and was never registered. Upon this state of facts, which is not disputed by either party, the district court refused the writ, and the plaintiffs appealed.

The first point made by the plaintiffs is, that the provision requiring pre-existing creditors of the county to register their warrants on pain of forfeiture of their claims is unconstitutional and void, because it impairs the obligation of contracts. The constitution of the United States provides that "no state shall pass any law impairing the obligation of contracts." The same provision in substance is contained in the constitution of this state.

It must be conceded that the intention of the constitution was to secure great practical results. It is equally true that this provision was intended to protect individuals. The powers of government among savage tribes of men are mainly exerted to protect the particular community against other opposing communities. Individual rights are mostly left to individual protection. Wrongs are redressed by the person injured or by his relatives. But among civilized nations, the leading intent of government is to regulate and protect the rights of the individual. The individual surrenders up the natural rights of self-protection, and in consideration of this surrender he receives the protection of the state. Whatever the state, therefore, binds itself to do, or not to do, must be observed. If the constitution of the state (as, for example, that of Great Britain) merely distributes and classifies, but does not limit, the powers of government, then its discretion is the only measure of its powers. But where a constitution limits the powers of government, the state can only exercise the discretion given. It is therefore the peculiar glory of our constitution that a single individual can

necessarily result the claims of the whole community when he is in the right.

The word "obligation," as found in this provision, is not used in its widest sense. It is the "obligation of contracts" that cannot be impaired. The obligation of other things than contracts is not protected. A contract is a voluntary and lawful agreement by competent parties, for a good consideration, to do or not do a specified thing. The only end and object of the contract is the doing or not doing the particular thing mentioned. The practical result is the only end aimed at by the parties, and the obligation of the contract is the vital binding element that secures this practical consummation.

If, then, the intention of the constitution was to secure great practical results by the protection granted to individuals, this protection can only consist in attaining the only end contemplated by the contract itself. If that end be substantially defeated by the law, the operative force of the obligation of the contract is impaired. Any other than practical and efficient protection would be idle.

A criminal statute without a penalty and a civil right without a remedy never can exist in the practical theory of government. It is not the intent of government to establish mere abstract and inoperative principles. A dormant right that cannot be enforced is no right at all. To say that the law will give a party a judgment, and yet refuse him an execution to enforce it, is to give him the shadow and withhold the substance. Such a position would be like the morality of the debtor who will never deny the debt; would pay it if he had the money, but never uses any exertions to get it; or like the right of appeal only allowed to a criminal after the sentence has been executed.

The right and the remedy, in the theory of all practical and just governments, must stand or fall together. To deny the right is necessarily to deny the remedy; and to admit the right, and yet deny the remedy, is to impair the right, and to render it either partially or wholly inoperative. It is more consistent to deny both the right and the consequent remedy than to admit the right, and then, in the face of this admission, deny its inseparable incident—its just result.

As the constitution intended to prohibit the legislature from defeating a certain end, it does not matter how, or by what means, or in what manner this end is sought to be defeated; the act is equally unconstitutional. If the purpose be defeated; the manner in which it is done is unimportant, and cannot change

the substantial result. If, therefore, the act will not allow the creditor a judgment; or if a judgment be allowed, and all means of enforcing it be prohibited, it is still unconstitutional. And if both be allowed, but under conditions which impair the right, it is equally a violation of this provision. The obligation of a contract may be impaired without being entirely destroyed. The last must include the first, but the first does not necessarily include the latter. The act can no more destroy than it can impair the obligation of a contract.

If these views be correct, then whatever provision of a statute substantially defeats the end contemplated by the parties in making the contract must impair its obligation. And to ascertain the end contemplated by them, we must look to the law as it existed at the time when the contract was made. All men are presumed to know the law; and the law then existing enters into and forms a part of the contract without any express stipulation to that effect. Parties in entering into contracts only expressly stipulate as to matters that cannot appear without such stipulation. It would be idle for them to say, expressly, that they incorporate in their agreement the law then existing.

As the law enters into the contract, and forms a part of it, the obligation of such contract must depend upon the law existing at the time the contract was made. The contract being, then, complete and operative, the legislature cannot, by a subsequent act, impair its obligation by requiring the performance of other conditions not required by the law of the contract itself. The rights, as well as the intentions of the parties, are fixed and ascertained by the existing law; therefore, to require the performance of other conditions to make the contract operative is to impair its obligation. The power to impose conditions after the contract is once complete and perfect is nothing but the power to impair its obligation, and this the constitution has prohibited.

It would be impracticable to review the numerous decisions of the federal and state tribunals upon this subject. I may, however, refer to the able opinions of Chief Justice Boyle and justices Mills and Ousley in reference to the relief laws of Kentucky, and to the opinion of Chief Justice Marshall, in the case of *Sturges v. Crowninshield*, 4 Wheat. 191; *Blair v. Williams*, 4 Litt. 35, 117. For a more full expression of my own views, I refer to my opinion in the case of *Stafford v. Lick*, 7 Cal. 479.

For the reasons stated, I am constrained to consider that provision of the act of April 27, 1855, declaring the claims of pre-

existing creditors forever barred if they failed to comply with the new conditions imposed, as impairing the obligation of contracts, and therefore void. It is not necessary, under this view of the case, to notice the other points made.

There being money in the county treasury applicable to the payment of this warrant, let a peremptory mandate issue.

FIELD, J. I concur in the judgment that a peremptory mandamus issue.

MCKEON v. BISBEE.

[9 CALIFORNIA, 127.]

INTEREST OF MINER IN HIS MINING CLAIM ON PUBLIC LANDS IS PROPERTY, and not having been exempted by law, may be taken in execution.

THE opinion states the facts.

Hall and Hume, for the appellants.

Sanderson and Newell, for the respondent.

By Court, TERRY, C. J. This was an action to recover possession of a mining claim, the plaintiff alleging title and prior possession. The defendant set up a title by purchase at a sale under execution. A demurrer to the answer, on the ground that the facts stated constituted no defense, was sustained by the court below, and a judgment rendered in favor of plaintiff.

The question presented is, whether a mining claim is liable to seizure and sale under execution.

By our statute, "all goods, chattels, money, and other property, real and personal, of the judgment debtor, not exempt by law," is liable to execution.

Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is "the right and interest which a man has in lands and chattels, to the exclusion of others;" and the term is sufficiently comprehensive to include every species of estate, real or personal: *Jackson v. Housel*, 17 Johns. 283; *Doe, Lessee, v. Langlands*, 14 East, 370.

The legislature have by a series of enactments recognized the right of the miner to take and occupy, for mining purposes, a portion of the public domain; and have provided a remedy by action against all who trespass on his possession.

"By this appropriation, he acquires a vested interest in the exclusive occupation and enjoyment of the land as against all the world, subject only to the right of the government by

whose license and permission his possession was acquired; and his right to protect the property for the time being is as full and perfect as if he was the tenant of the superior proprietor for years, or for life:" *Merced Mining Company v. Fremont*, 7 Cal. 130 [68 Am. Dec. 762].

He has, in addition to the right of exclusive possession and enjoyment, the right of absolute disposition; and may sell, transfer, or hypothecate, without let or hinderance from any one. Contracts for the sale of such interests have been frequently recognized and enforced by the courts.

We think the interest of a miner in his mining claim is property, and not having been exempted by law, may be taken in execution.

Judgment reversed, and cause remanded for further proceedings.

BURNETT, J., concurred. —

THE PRINCIPAL CASE IS CITED IN *State v. Moore*, 12 Cal. 70, and *Hughes v. Devlin*, 23 Id. 506, to the point that a miner's interest in his claim is subject to execution.

HALLECK v. GUY.

[9 CALIFORNIA, 181.]

SALES BY EXECUTORS ARE JUDICIAL, and the contract with the bidder need not be signed by the parties.

SUBSTITUTION OF ONE NAME FOR ANOTHER ON AUCTIONEER'S LIST OF PURCHASERS cannot affect the validity of the sale. The orders directing and confirming it give it validity.

EXECUTOR'S DEED CONTAINS NO WARRANTY, and only conveys the title of the deceased to the purchaser.

IN PROBATE SALES, CAVEAT EMPTOR IS RULE, and it is no excuse for not paying the bid that the bidder finds the title defective.

DEBT NOT DUE CANNOT AT ITS FACE BE OFFSET AGAINST ANOTHER AT ITS FACE where they bear different rates of interest.

The opinion states the facts.

Whitcomb, Pringle, and Felton, for the appellant.

Gregory Yale, for the respondents.

By Court, BURNETT, J. This was a bill to compel the defendant to pay the sum bid by him for certain lots sold by plaintiffs, as executors of Joseph L. Folsom, deceased, under an order of the probate court. The court below rendered a decree for the plaintiffs, and the defendant appealed.

The first point made by the defendant is, that the sale was not binding because there was no subscribing of the contract by the plaintiffs or their agent. The fate of this objection depends upon the question whether sales by executors and administrators, under our probate system, are judicial or ministerial. If judicial, the contract need not be in writing, subscribed by the parties. The statute of frauds does not apply to such a case, the sale being made by the court.

The administrator or executor is under the control of the probate court. In the sale of property he is the moving party in behalf of creditors, but acts subject to the orders of the court. The order of the probate court directing the sale of the real estate of the deceased is a judicial act. It is, in substance, similar to a decree in chancery for the sale of specific property. The order of the probate court may not in specific terms describe the exact property to be sold; but it still has reference to the property already described upon its records, and is therefore, in effect, the same as a decree in chancery. The administrator, or executor, in making the sale, does the particular act which the order of the court itself directs him to perform. The court determines that specific property must be sold, and by its order directs the administrator to sell the same according to law. The mode of the sale is pointed out by express statute. When sold, the report of the sale is made by the administrator to the court, and unless confirmed by order of the court, there is no binding sale, and no title can pass to the purchaser. To be valid, the sale must first be ordered by the court, and afterwards confirmed by it. The order for the sale, and the order of confirmation, are both judicial acts; and these two concurring make the sale a judicial sale, and therefore not within the statute of frauds. In making the sale itself, the administrator acts for the court and under its orders. He receives the bids and returns them, like a master in chancery, into the court for its consideration. The probate court is the guardian of the rights of all parties interested in the estate, and acts for all.

But in a judgment at law there is no direction by the court itself that any specific property shall be sold. Judgment is given for a specified sum, for which execution may issue, and such property of the defendant sold as the sheriff may levy upon. What particular property will be sold depends upon the ministerial act of the sheriff; and the sale is made by him, and the title passed to the purchaser, without the action or confirmation of the court. It is true that there is a difference in the mode of

enforcing a sale ordered by a court of chancery and that of a sale by order of the probate court. But this difference in the mere mode does not affect the character of the sale itself. When a sale is made under a decree in chancery, the bidder may be committed for contempt if he refuses to comply with his bid: *Woods v. Mann*, 3 Sumn. 326. The court can summon all parties interested and settle their conflicting claims to the property itself.

If we concede that the probate court cannot commit the bidder for contempt when he fails to comply with his bid, this does not change the character of the sale. Nor does the fact that the probate court cannot settle conflicting claims to the property have any such effect, for the reason that the court can only order a sale of the interest of the deceased.

The counsel for defendant has referred us to the case of *Smith v. Arnold*, 5 Mason, 414. In that case Mr. Justice Story held that a sale by an administrator, under the law of Rhode Island, was not a judicial sale. But the principle upon which the decision rested, and the reason given by the judge, sustain the view we have taken. "In the case of an administrator the authority to sell is, indeed, granted by a court of law. But the court, when it has once authorized the administrator to sell, is *functus officio*. The proceedings of the administrator never come before the court for examination or confirmation. They are matters *in pais*, over which the court has no control."

There is doubtless some conflict of authority in reference to the character of probate sales of real estate. But under our system, which requires both the order of sale and the confirmation by the court, to make the sale valid, we think there can be no reasonable doubt. These sales are considered judicial by the following authorities: *Planters' Bank v. Sharp*, 2 How. 312; *Sargeant v. State Bank of Indiana*, 12 Id. 386; *King v. Gunnison*, 4 Pa. St. 172; *Robb v. Mann*, 11 Id. 305 [51 Am. Dec. 551]; *Jones v. Read*, 1 La. Ann. 200; *Lynch v. Baxter*, 4 Tex. 437 [51 Am. Dec. 735]; *Worthington v. McRoberts*, 9 Ala. 300. The case of *Abell v. Calderwood*, 4 Cal. 90, is not opposed to this view.

The second point made by the counsel of defendant is, that the defendant never bid for two of the lots included in the alleged sale.

It appears that these two lots were struck off to another bidder, who failed to comply with the terms of the sale, and that his name was erased on the list of the auctioneer, and the defendant wrote his own name in the place of that of the first

defendant's mortgage debt was drawing two and a half per cent per month, and the proceeds of the sale were dedicated to the payment of his debt. But by the terms of the sale he was compelled to give more for the property than he otherwise would have been. The executors gave him property in place of cash, but they charged him cash instead of credit prices for it, when, at the same time, the sale was partly on credit.

The decree must be modified, and the case remanded to the court below; with directions to modify the decree in accordance with this opinion, without costs on appeal.

TERBY, C. J., concurred.

ADMINISTRATOR'S SALE IS JUDICIAL SALE: *Lynch v. Baxter*, 51 Am. Dec. 735; *Moore v. Schultz*, 53 Id. 446; *Sackett v. Twining*, 57 Id. 599; *Robb v. Mann*, 51 Id. 551.

AUCTIONEER IS REGARDED AS AGENT OF BOTH VENDOR AND VENDER, at the time of the sale, and his entry in his book is a sufficient memorandum of the sale, within the intent and meaning of the statute of frauds, and binds both parties: *Doty v. Wilder*, 60 Am. Dec. 756; *Craig v. Godfrey*, 54 Id. 299, note 300, where other cases are collected.

EXECUTOR CANNOT BIND ESTATE OF DECEDENT BY WARRANTY DEED, and if he gives the purchaser a bond for warranty title, it is not in his character as executor, but personally, that he does so: *Worthy v. Johnson*, 52 Am. Dec. 399; *Lynch v. Baxter*, 51 Id. 735.

MITCHELL v. REED.

[9 CALIFORNIA, 204.]

PARTY MAKING EXPRESS DECLARATION WILL BE ESTOPPED to deny its truth, where it was not confidential, but general, and has been acted upon by others.

ESTOPPEL OPERATES BECAUSE DECLARATION HAS BEEN ACTED ON, and not because of its truth or falsity or the intention with which it was made.

FACTS WORKING ESTOPPEL.—Where H., a clerk, sold liquor in M.'s store, and M. declared it belonged to H., *held*, that when attached for the debts of H., M.'s declaration estopped him from claiming the property.

The opinion states the facts.

H. O. Beatty, for the appellant.

Cross and Marshall, for the respondent.

By Court, BURNETT, J. The plaintiff was a merchant engaged in the sale of groceries and liquors. The business at the store was generally conducted by his clerk, D. H. Haskell. On the trial, it was proved by two witnesses that plaintiff was a Son of

Temperance, and that he repeatedly denied that he dealt in liquors, alleging that the liquors in the store were the property of Haskell, who sold them without plaintiff's consent. These declarations of plaintiff coming to the ears of William H. McGrew, a creditor of Haskell's, he sued out an attachment, and had the liquors attached, and sold as the property of Haskell. When the defendant Reed, a constable, levied the attachment upon the liquors, he was notified by Haskell, as the agent of Mitchell, that they were in fact Mitchell's property. This suit was brought to recover the value of the goods sold. The plaintiff had judgment in the court below, and the defendant appealed.

The court below instructed the jury that if McGrew, by the representations of Mitchell concerning the liquors, was induced to levy the attachment upon them as the property of Haskell, then Mitchell would be estopped to claim them as his own, unless he, by himself or agent, notified the officer that the liquors were the property of plaintiff; in which case he would not be estopped.

It is insisted by the learned counsel of defendant that the latter portion of the instruction was erroneous. Conceding that McGrew was induced by the representations of Mitchell to bring his suit, and levy his attachment upon the liquors as the property of Haskell, was Mitchell estopped to claim the property as his own?

Professor Greenleaf, in his accurate work on evidence, divides estoppels into two kinds, solemn and unsolemn admissions. The latter are those "which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied, without a breach of good faith:" Sec. 27. The rule is laid down by the author in section 207, in this language: "Admissions, whether of law or of fact, which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself or implied from the open and general conduct of the party; for in the latter case the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it."

If the "implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it," we can see no reason why an express declaration to a

third party may not be considered as equally addressed to others who afterwards act upon it. If the express declaration be confided to the third party as a confidential communication, then it might admit of some doubt. But where the express declaration to the third party is not confidential, but general, and this is afterwards acted upon by others, the party making the declaration should be estopped.

The particular intention with which the declaration, expressed or implied, was made is not material, except, perhaps, when the communication is confidential. It is the fact that the declaration has been acted upon by others that constitutes the liability to them. "It makes no difference in the operation of the rule whether the thing admitted was true or false—it being the fact that it has been acted upon that renders it conclusive. . . . If it is a case of innocent mistake, still if it has been acted upon by another, it is conclusive in his favor:" 1 Greenl. Ev., sec. 208, and note 4.

If McGrew was induced to bring his suit, and levy his attachment in consequence of the declarations of Mitchell, then McGrew acted upon those declarations. And after he incurred the expense of a suit he otherwise would not have brought, it was too late for Mitchell to object, unless Haskell had other property, known and accessible to McGrew, upon which he could have levied his writ. If McGrew had given credit to Haskell upon the faith of Mitchell's declarations, then it would be perfectly clear, from reason and authority, that the estoppel would be complete. The same principle applies to this case. There can be no difference except as to the amount in the two cases. The law will not look upon that question. The expense to which McGrew was put by the declaration of Mitchell may have been much less than the amount of his debt against Haskell; but still he was induced to incur this expense in consequence of Mitchell's declaration. If Mitchell is not holden, then McGrew must lose his costs and expenses.

The case of *First Presbyterian Congregation of Salem v. Williams*, cited by Nelson, J., in *Welland Canal Company v. Hathaway*, 8 Wend. 483, is a case in point. There the plaintiffs were induced to bring an ejectment suit by the false statement of the defendant, and the latter was held to be estopped to set up an otherwise good defense against the action.

If parties choose to make untrue statements by which others are injured, they should be estopped to unsay what they have before said. Estoppels, in general, are odious; but in mercan-

tile and ordinary business transactions, where men must trust to appearances and the declarations of parties, because they have no other means of information in such cases, the courts have been inclined to extend the list of estoppels: *Doe v. Oliver*, 2 Smith's Lead. Cas. 605, note.

Judgment reversed, and cause remanded.

TERREY, C. J., concurred.

ESTOPPEL IN PARI.—The general rule as to estoppels *in pari* is laid down in note to *Taylor v. Zepp*, 55 Am. Dec. 118, where other cases are collected. But no estoppel arises from a deceptive answer to an impertinent inquiry from one who may be deemed a meddlesome intruder, where the party makes known the truth as soon as he sees his answer acted on as true: *Pierce v. Andrews*, 52 Id. 748, and note. Equitable estoppel never takes place unless the party seeking to avail himself of it has been actually misled: *Jewett v. Miller*, 61 Id. 751, and note.

THE PRINCIPAL CASE IS CITED in *McGee v. Stone*, 9 Cal. 606, and *Horn v. Cole*, 51 N. H. 287, 8. C., 12 Am. Rep. 123, 124, to the point that to work an estoppel it is not necessary that declarations or conduct should be intended to deceive, but that if they were likely to deceive, and parties acted on them, it is enough.

GERKE v. CALIFORNIA STEAM NAVIGATION CO.

[9 CALIFORNIA, 251.]

DECLARATIONS OF MASTER OF STEAMBOAT WHILE SPARKS ARE SETTING FIRE TO GRAIN-FIELDS are part of the *res gestæ*, and are admissible in evidence to establish the liability of the owners of the steamboat for the damage done by the fire.

STEAMBOAT COMPANIES MUST PROVIDE ALL REASONABLE PRECAUTIONS to protect the property of others. Carelessness in providing means of prevention of injury, or in the use of the means where provided, accompanied by injury to an innocent party, will make the company liable.

WHAT FACTS AND CIRCUMSTANCES CONSTITUTE EVIDENCE OF CARELESSNESS is a question of law for the courts. But what particular weight will be given to these facts and circumstances is a matter for the jury.

FAILURE TO USE SPARK-CATCHERS IS EVIDENCE OF CARELESSNESS in an action against a steamboat company for setting fire to a grain-field, and that fact being admitted by the pleadings, with other testimony, justifies a refusal of a nonsuit and sustains the verdict of the jury.

THE opinion states the facts.

Janes, Lake, and Boyd, for the appellant.

E. Cook, for the respondent.

By Court, BURNETT, J. This was an action to recover damages for the unskillful construction of the chimneys of the

steamer Swan, and the negligence of the officers and servants of the company in running the vessel upon the Sacramento river, in consequence of which the crop of grain belonging to plaintiff, on the bank of the stream, was set on fire and consumed by sparks issuing from the chimneys of the boat, in July, 1856. The plaintiff obtained a verdict and judgment in the court below, and the defendant appealed.

The first point made by the counsel of defendant is that the court erred in admitting evidence of the declarations of the master.

The declarations of the master were proved by the witness McConoughay, who states substantially that he was a passenger upon the boat at the time; that he saw sparks and pieces of bark on fire flying out of the chimneys and lighting on the grass along the edge of the river on both banks; that the wind was blowing pretty hard at the time, and the fire immediately communicated to grass, grain, or anything that was near; and that he saw the fire entering into the grain of plaintiff, which was consumed. The plaintiff then asked the witness this question: "What conversation was had, if any, by the officers of the boat in relation to the fire?" The answer of the witness was: "I heard the captain say that it was pretty hard on the farmers to have their crops burned up; and if he thought the wind would lull in two or three hours, he would wait that time."

The question and answer were objected to by defendant; the objection was overruled, and the defendant excepted.

The declarations of an agent will bind the principal if made during the continuance of the agency and at the very time of the transaction. These declarations, when thus made, are considered as part of the *res gestæ*: Story on Agency, secs. 134, 135; Greenl. Ev., sec. 113. The question to determine is, whether these declarations of the master did constitute a part of the *res gestæ*. In the case of *Innes v. Steamer Senator*, 1 Cal. 461 [54 Am. Dec. 305], it was held by Bennett, J., that the declarations of the master made the next morning after the collision were no part of the *res gestæ*. So in the case of *Mateer v. Brown*, 1 Cal. 224 [52 Am. Dec. 303], it was held that the declarations of a barkeeper were not binding upon his principal when not made in the discharge of his duty. The defendant in that case was an innkeeper, and the plaintiff left a package of gold-dust with the barkeeper. The declarations were not made by the barkeeper at the time he received the deposit, but afterwards, when he took the bundle out of the closet to exhibit it to

a stranger. This court held that the act of exhibiting the package to a stranger was not done in the discharge of his duties as barkeeper, and his declarations were therefore but hearsay.

But the circumstances of the present case are different. It appears clearly from the testimony that the fire was communicated from the chimneys of the steamer to the shore, at places below, opposite, and above the farm of the plaintiff. This occurred on the same day, and was but one continuous act; and the declarations of the master were made during this period, and while the boat was running under his command. We think these declarations were clearly admissible.

The second point made by the learned counsel of defendant is, that the court erred in overruling the motion for a nonsuit, there being no evidence of negligence on the part of the defendant.

The general rule upon this subject is laid down with great clearness by Cowen: *Cow. Treatise*, 384. Speaking of the action of trespass on the case, he says: "It lies in all cases of negligence in the use or disposition of one's property, or in clearing or improving it, by which another is injured; and the true question in such cases is, whether the defendant, or his servant, has been guilty of negligence. For it is a maxim in law, that a man is bound so to use his own as not to injure that which belongs to his neighbor."

In the case of *Radcliff's Ex'rs v. Mayor etc. of Brooklyn*, 4 N. Y. 195 [53 Am. Dec. 357], Bronson, C. J., has very ably reviewed the authorities upon this question. The learned chief justice has stated the true rule in these clear and concise words: "An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow."

The act must first be lawful; and second, it must be done in a proper manner, to excuse a resulting injury.

The right of the defendant to navigate the Sacramento river with steamers, at all seasons of the year, cannot be questioned. The only question is, whether there was negligence in exercising this lawful right.

We have been referred by the counsel of defendant to the cases of *Stuart v. Hawley*, 22 Barb. 619, and *Rood v. New York & Erie R. R. Co.*, 18 Id. 80. In the first case, the defendant set fire to his fallow, which had been previously burned over. Three days afterwards the wind blew violently, and the fire communicated to an adjoining pasture, across which it passed

to the plaintiff's premises and burned his grass, crops, etc. The court held that the defendant was not liable. The fire was set in the dry season in July, but in low swamp ground that had been burned over in the previous month of May. There was no brush near, and the fire was set on a day which looked likely for rain. The court evidently laid much stress on the fact that the spreading of the fire was the consequence of the high wind that arose three days afterwards. In the second case, it appeared that the plaintiff had sold to the company a strip of land for the road, of the value of sixty dollars, for the sum of one thousand six hundred dollars; and the court held that it was "but fair to presume that, in giving his deed to the defendant, the plaintiff must have contemplated the risk of fire from engines running on the road." It was therefore held that the defendant was only responsible to the plaintiff for ordinary care and diligence in the manner of using its road. It was also held, in that case, that authority to use a steam-engine upon the road was an authority to emit sparks therefrom; and if the most approved means which science and skill have invented are applied to prevent sparks from causing injuries, the company is not liable in case damage is occasioned by fire communicated in that manner. The company in that case had used the most extraordinary precautions, by furnishing their engines with the most approved spark-catchers, and by supplying the road with sectional superintendents, section-masters, and subordinate watchmen.

The counsel of plaintiff have referred to the case of *Haylett v. Philadelphia & Reading R. R. Co.*, 23 Pa. St. 373. It was proved in that case that the road passed seventy-seven feet from the dwelling-house of the plaintiff, and that the house was set on fire by sparks from engines passing at a time when the weather was very dry and windy, and the wind blowing strong across the road to plaintiff's house. Sparks were seen flying from the engines to the distance of fifty yards from the road; and fences and fields were set on fire about the same time and at considerable distances from the road. The defendant proved that all its engines were in good order, and were all provided with good spark-catchers. On this state of facts, the court below directed the jury to find for the defendant; but the supreme court reversed the judgment, holding that it was a question for the jury to determine, under the circumstances of that case, whether the injury was caused by the carelessness of the defendant's servants. In delivering the opinion of the court,

Lowry, J., said: "How is it possible for the court to say, as matter of law, how many sparks, or how many fires caused by them, it takes to prove carelessness? How can the law declare, except as a deduction from facts found, what are sufficient spark-catchers? When we find fires started by a locomotive at distances from eighty to one hundred and fifty feet from the road, how can we say that that is no evidence of carelessness? It is a question of fact whether the small sparks that escape through a good spark-catcher will ignite wood at such distance. We see wooden houses and lumber, and fire-wood and shingles, standing all along the very edge of railroads without being burned. How can we say that the happening of several fires all about the same time, along the line of road, is no evidence of carelessness?"

The court further said that railroad companies "are bound to temper their care according to the circumstances of danger, and to exert more care when the property of others is in danger than when it is not."

The doctrine laid down in that case seems to be the true rule. The company have the right to use steam-power in propelling cars on railroads, or boats on the rivers, but it must provide all reasonable precautions to protect the property of others; and these means of prevention must not only be provided, but they must be properly used. Carelessness in either particular, accompanied with injury to any innocent party, will make the company liable. What facts and circumstances constitute evidence of carelessness is a question of law for the courts to determine. But what particular weight the jury will give to these facts and circumstances is a matter for the jury.

In the present case it was informally, though substantially, alleged in the verified complaint that the chimneys of the Swan were not furnished with spark-catchers. This allegation is not specifically denied in the answer, and must be taken as confessed. This admission is evidence of carelessness, and taken in connection with the other testimony, justified the court in refusing a nonsuit, and amply sustains the verdict of the jury.

The third and fourth points of defendant have been substantially disposed of in our decision of the first and second.

Judgment affirmed.

TERRY, C. J., concurred. —

DECLARATIONS OF AGENT ARE ADMISSIBLE AGAINST HIS PRINCIPAL, when made in the performance of some act that would bind the principal. They are then part of the *res gesta*, and are in the nature of original evidence:

Moore v. Bettis, 53 Am. Dec. 771, and note 773, where the subject is discussed at length. And generally, the declarations of a party are admissible in evidence if made at the time of the act done by him, and explanatory thereof, where evidence of such act is itself admissible: *Wetmore v. Mell*, 59 Id. 607, and note, where other cases are collected; *Printup v. Mitchell*, 63 Id. 258.

AS TO LIABILITY FOR FIRES SET BY LOCOMOTIVES, NEGLIGENCE IN DOING SO, and what preventive machinery should be used, see note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 70; *Hart v. Western R. R. Co.*, 46 Id. 719; *Baltimore etc. R. R. Co. v. Woodruff*, 59 Id. 72.

FAILURE TO USE SPARK-CATCHERS is evidence of negligence: *Baltimore etc. R. R. Co. v. Woodruff*, 59 Am. Dec. 72.

WHAT AMOUNTS TO NEGLIGENCE IS QUESTION OF LAW: *Herring v. Wilmington etc. R. R. Co.*, 51 Am. Dec. 395; but see *Trow v. Vermont Central R. R. Co.*, 58 Id. 191, where negligence is declared to be a mixed question of law and fact.

THE PRINCIPAL CASE IS CITED in *Garfield v. Knight's Ferry Co.*, 14 Cal. 37, to the point that an agent's admissions bind the principal where they are part of the *res gestæ*; and in *Aguirre v. Packard*, Id. 171, to the point that the use of a spark-catcher insufficient to retain the sparks of a steamboat furnace is evidence of carelessness.

McMILLAN v. RICHARDS. PEOPLE EX REL. Mc- MILLAN v. VISCHER. McMILLAN v. HYATT.

[9 CALIFORNIA, 365.]

EQUITY DOCTRINE AS TO MORTGAGE is that it is a mere security for a debt, passes only a chattel interest, and constitutes simply a lien or incumbrance on the land.

EQUITY OF REDEMPTION IS REAL AND BENEFICIAL ESTATE in land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage.

EQUITY DOCTRINES RESPECTING MORTGAGES HAVE BEEN ADOPTED and asserted by the courts of California.

PAYMENT OF DEBT EXTINGUISHES MORTGAGE which is security for it.

FORECLOSURES OF MORTGAGES, IN ENGLISH SENSE, by which the mortgagor, after default, is called upon to repay by a specified day, or be forever barred of his equity of redemption, are unknown to our law.

EFFECT OF FORECLOSURE SUIT is merely to ascertain the amount due, and to obtain a decree directing the sale of the premises for its satisfaction.

STATUTORY RIGHT OF REDEMPTION APPLIES TO SALES UNDER DECREES IN MORTGAGE CASES the same as to sales under ordinary judgments at law.

MORTGAGOR RETAINS ESTATE AFTER FORECLOSURE and until consummation of sale by conveyance, which, when executed, will take effect from the date of the mortgage.

MORTGAGOR'S ESTATE, AFTER FORECLOSURE SALE and before conveyance to purchaser, is subject to the lien of a judgment against the mortgagor.

JUDGMENT LIEN IS EXTINGUISHED BY SALE OF PREMISES UNDER PRIOR LIEN, followed by a conveyance from the sheriff.

REDEMPTIONER, TO REDEEM, MUST PAY FULL AMOUNT OF JUDGMENT in favor of a mortgagee who purchases at the foreclosure sale for less than the face of the judgment. The amount bid and interest, and eighteen per cent named in the statute, is insufficient.

MORTGAGEE BECOMING PURCHASER FOR LESS THAN JUDGMENT HAS LIEN upon the property prior to that of the redemptioner for the balance unpaid.

EXECUTION PURCHASER HAS NO LEGAL ESTATE IN PREMISES UNTIL CONVEYANCE EXECUTED. He has only a right to an estate which may be perfected by a conveyance.

OBJECT OF PROTEST is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It has no application to voluntary payments.

PROTEST DOES NOT PREVENT PAYMENT BEING DISCHARGE of the demand upon which it is made, so far as such demand is legal.

ATTACHMENT CANNOT FASTEN ON FUNDS IN BANKERS' HANDS for which certificates of deposit have been issued.

SUITS BY ATTACHMENT AND INJUNCTION TO OBTAIN AND SECURE REPAYMENT of money overpaid upon redemption do not impair the legal effect of the payment.

LAW RAISES OBLIGATION TO REFUND MONEY PAID UPON COMPELSION, and the form of action is *assumpsit* for money had and received.

MANDAMUS TO COMPEL SHERIFF TO EXECUTE DEED TO REDEMPTIONER may be brought in the county where the relator resides.

STATUTE THAT ACTIONS AGAINST PUBLIC OFFICER FOR ACTS DONE by him in virtue of his office shall be tried in the county where the cause arose, applies only to affirmative acts of the officer, and not to mere omissions or neglect of official duty.

THE opinion states the facts.

Heydenfeldt and Shafter, for the appellants in the ejectment suit and in the equity suit, and for the respondent in the proceeding for *mandamus*.

John Currey, for the respondents in the ejectment suit and in the equity suit, and for the appellant in the proceeding for *mandamus*.

J. A. McDougall and J. B. Weller, also for the respondents in the ejectment suit.

By Court, FIELD, J. These three cases were argued together. The first is an action of ejectment; the second, an application for a *mandamus*; and the third, a bill in equity. In the first, judgment was rendered for defendants; in the second, a peremptory *mandamus* was awarded; and in the third, the demurrer was sustained, and the bill dismissed. The first two cases depend upon the same question—the validity of the alleged redemption by McMillan, of the premises in controversy, from the sale under the decree of foreclosure.

The facts as disclosed by the records are briefly as follows: In December, 1851, Osio was the owner of the premises, which are situated in Marin county, and executed a mortgage upon them to Bird to secure a promissory note of three thousand dollars, payable in six months, with interest at the rate of five per cent a month. Bird assigned the note and mortgage to Edwards and Edwards assigned them to Cary. In the mean time, Osio sold and conveyed the premises to Randall. In September, 1853, Cary instituted suit upon the mortgage, making Osio and Randall defendants; and in December, 1854, obtained a decree for the foreclosure of the mortgage and the sale of the premises to satisfy the debt due, which was adjudged to be eight thousand four hundred dollars, the amount to draw interest at five per cent a month. From the decree Randall appealed to the supreme court, where at the April term, 1856, the appeal was dismissed, with twenty per cent damages. The *remittitur* having been filed in the court below, an execution or certified copy of the decree was issued to the sheriff, by whom the premises were sold on the fourteenth of June, 1856 to Cary for the sum of sixteen thousand dollars. Cary received a certificate of the sale, which, with the balance due him on the judgment, was subsequently assigned to the defendant Hyatt, to whom, on the nineteenth of February, 1857, the sheriff executed a deed of the premises. The defendants claim under this deed.


In November, 1854, Jessie Smith recovered a judgment against Randall in the fourth district court, and on the twentieth of February, 1855, filed a transcript of its docket in the office of the recorder of Marin county. Upon this judgment execution was issued, and the interest of Randall in the premises sold thereunder, on the twelfth of March, 1855, for two thousand dollars, at which sale the defendant Richards became the purchaser, received a certificate of sale, and on the ninth of February, 1856, a deed from the sheriff.

In January, 1855, the plaintiff McMillan recovered a judgment against Randall, in the fourth district court, for over fourteen thousand dollars, and filed a transcript of its docket in the office of the recorder of Marin county, on the seventh of February, 1855. On the twenty-first of July, 1855, the plaintiff recovered another judgment against Randall in the twelfth district court, for over eight thousand dollars, and immediately thereafter filed a transcript of its docket in the same recorder's office. Upon the first judgment recovered by the plaintiff, execution was issued in January, 1856, and the interest of Randall was sold

thereunder on the seventeenth of March, 1856, for two thousand dollars, at which sale the plaintiff became the purchaser, received a certificate of sale, and on the twenty-sixth of December, 1856, a deed from the sheriff.

On the thirteenth of December, 1856, the plaintiff, in company with his counsel, called upon the sheriff of Marin county to redeem the premises from the purchase and lien of Cary under the decree in the foreclosure case, serving at the same time upon the sheriff a notice of redemption, accompanied with his affidavit of the amount due upon his two judgments and duly certified copies of their dockets. On the evening previous the counsel of the plaintiff had requested the sheriff to prepare a statement of the amount necessary for the redemption, which he accordingly did on the following morning, making the amount twenty-four thousand one hundred and twenty-six dollars and eight cents. This sum was paid by the plaintiff to the sheriff, with a protest as to certain specified items. The circumstances attending this payment, with the protest and subsequent suits, will be fully stated and considered in determining the question how far the payment operated as a redemption. The district court of the seventh district held, in the ejectment suit, that only the sum of seventeen thousand six hundred and six dollars and eighty-seven cents operated as a legal payment for the purposes of redemption, and that the same was insufficient, and gave judgment for the defendants; whilst the district court of the twelfth district held that a redemption was effected, and ordered a peremptory *mandamus* to the sheriff of Marin county to execute a deed to the plaintiff as redemptioner.

The first question presented relates to the right of redemption by the plaintiff. This right is denied by the defendants, and in support of their position they contend: 1. That the legal title to the premises passed to the mortgagee upon the execution of the Osio mortgage, leaving in the mortgagor only an equity of redemption; 2. That by the decree in the mortgage case the equity of redemption was entirely barred and foreclosed, and the estate became absolute in Cary, the assignee of the mortgage; 3. That the judgments of the plaintiff, having been recovered after the decree of foreclosure, did not attach as liens upon the premises; and 4. That even if liens by the judgments originally attached, they were subsequently lost; the lien of the first judgment by the sale on the execution, although a part only of the judgment was satisfied by such sale, and the lien of the second judgment by the sale under the Smith judgment.



There is great diversity of opinion in the adjudged cases as to the rights of mortgagor and mortgagee, both before and after condition broken, arising from the different views taken of mortgages at law and equity, and the more or less extended application of equitable doctrines to contracts of this description in courts of law. In England a mortgage is regarded in law as a conveyance, vesting in the mortgagee, upon its execution, a conditional estate, which becomes absolute upon breach of its condition, and of course carrying with it all the rights and incidents belonging to the ownership of property. Thus the mortgagee, unless restrained by stipulations in the mortgage, is there entitled to immediate possession of the land, and may enter peaceably or bring ejectment; and his right to possession cannot be defeated, except by payment at the period fixed by the terms of the mortgage. Payment subsequent to that period only gives an equity of redemption, and a reconveyance is necessary to vest the title in the mortgagor: Coote on Mort. 339; 2 Greenleaf's Cruise, 91. The same doctrine prevails in several of the states. Thus in *Doe ex dem. Shute v. Grimes*, 7 Blackf. 1, the supreme court of Indiana held that an action of ejectment would lie by the mortgagee against the mortgagor before default. "The law, we think," said Sullivan, J., "is well settled that the mortgagee, by virtue of his mortgage, becomes the legal owner of the premises, and is consequently entitled at law to the immediate possession, unless there by an agreement between the parties, expressed in the contract or plainly inferable from it, that the mortgagor shall remain in possession." *Blaney v. Bearce*, 2 Greenl. 137; *Newall v. Wright*, 3 Mass. 139 [3 Am. Dec. 98]; *Colman v. Packard*, 16 Id. 39. But in equity, both in England and the United States, a mortgage is regarded in a very different light. The settled doctrine of equity is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal and the land the incident; that the mortgage constitutes simply a lien or incumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage. This equitable doctrine, established to prevent the hardships springing by the rules of law from a failure in the strict performance of the conditions attached to the conveyance, and to give effect to the just intent of the parties in contracts of this description, has been in most of the states gradually adopted by the courts of law, although in some instances to a limited extent

only: 4 Kent's Com. 160. The cases indicate a fluctuation between equitable and common-law views of the subject; and a hesitation by the courts of law to carry the equitable doctrine to its legitimate results: *Gray v. Jenks*, 3 Mason, 521.

"Unless the different purposes of a mortgage are adverted to," observes Parker, C. J., in *Smith v. Moore*, 11 N. H. 59, "there would appear to be much confusion in the books relative to the rights of the mortgagor and mortgagee, and with those purposes in view, an attempt to reconcile them would be made in vain."

The law concerning estates in dower, referred to by the defendants' counsel, furnishes an illustration of the change which the original character of mortgages has undergone. To entitle a widow to a dower, the seisin of the husband must have been more than an equitable seisin; it must have been a legal seisin of the estate of inheritance. In the case of *Stelle v. Carrol*, 12 Pet. 205, Taney, C. J., said "that, according to the principles of the common law, a widow is not dowable in her husband's equity of redemption; and if a man mortgages in fee before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower." But in the case of *Collins v. Torry*, 7 Johns. 278 [5 Am. Dec. 273], it was adjudged that the estate of the mortgagor is the real estate at law, and that the widow of the mortgagor may recover her dower out of the land mortgaged, the court saying: "We have in this state [New York] gone greater lengths than the precedents in the English books towards a recognition of the mortgagor's estate at law."

In *Runyan v. Mersereau*, 11 Johns. 538 [6 Am. Dec. 393], which was an action of trespass, the question presented was, whether the freehold was in the plaintiff who had purchased the equity of redemption under a judgment against the mortgagor, or in the defendant, the mortgagee, whose mortgage was prior to the judgment; and the court held the freehold to be in the plaintiff, and said: "Mortgages are not considered as conveyances of land within the statute of frauds, and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage."

In *Jackson v. Bronson*, 19 Johns. 325, the mortgagor sustained ejectment against the grantee of the mortgagee, and the court said: "It is now well settled that the mortgagee has a mere chattel interest, and the mortgagor is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond, or personal security for the debt, and the assignment

of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity."

In *Gardner v. Heartt*, 3 Denio, 234, Beardsley, J., says: "A mortgage creates a specific lien on the land mortgaged, as a judgment duly docketed does a general one on the land of the judgment debtor. But the mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt; title to the land, notwithstanding the mortgage, remaining in the mortgagor."

In *Waring v. Smyth*, 2 Barb. Ch. 135, Chancellor Walworth said: "Before the adoption of the revised statutes, it was settled by the courts of this state that the mortgagor was to be considered as the real owner of the fee of the lands mortgaged, except for the mere purpose of protecting the mortgagee as the holder of a security thereon for the payment of his debt. And the revised statutes have restricted the legal rights of the mortgagee still further, by depriving him of the power to bring a suit to recover the possession of the mortgaged premises before a foreclosure. The only right he now has in the land itself is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. The mortgage, then, is here nothing but a chose in action, or a mere lien or security upon the mortgaged premises, as an incident to the debt itself." The cases cited above from Johnson's reports were decided several years previous to the adoption of the revised statutes referred to by the chancellor. A provision more extensive in effect than the New York statute is embodied in our practice act. Section 260 reads as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." This section takes from the instrument its common-law character, and restricts it to the purposes of security. It does not, it is true, in terms, change the estates at law of the mortgagor and mortgagee, but by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine, upon a consideration of which the section was evidently drawn. An instrument which confers no right of either present or future possession possesses little of the character of a conveyance, and can hardly be deemed to pass any estate in the land. The just and liberal doctrines of equity respecting mortgages have been adopted in this state, and asserted, either


directly or indirectly, in repeated instances by this court. In *Godeffroy v. Caldwell*, 2 Cal. 489 [56 Am. Dec. 360], it was said that "mortgages at the present day are considered as merely securities for the payment of money, and no breach of their conditions can possibly vest the title in the mortgagee."

In *Peters v. Jamestown Bridge Company*, 5 Cal. 336 [63 Am. Dec. 134], the mortgagee, Perry, had conveyed the property to one person, and assigned the mortgage to another. The plaintiff was the grantee of the property, and the defendants were assignees of the mortgage. The defendants commenced an action to foreclose the mortgage, and obtained a decree, and were proceeding to sell the property, when the plaintiff brought suit enjoining them from further proceedings, on the ground that the sale would create a cloud upon his title. The court below decreed a perpetual injunction, and upon appeal to this court the decree was reversed; and Heydenfeldt, J., said: "The deed from Perry to plaintiff could not operate as an assignment of the mortgage. The latter is a mere security for the debt, and cannot pass without a transfer of the debt; so it would seem that the two transactions are totally different in character; the intent of the one is to convey the title to land; of the other, to transfer a debt with its security. If a contrary doctrine was maintained, it would produce the evil, as in this case, of enabling a net to be thrown for the entrapment of the innocent."

In *Bennett v. Taylor*, 5 Cal. 502, the facts are not stated, but it would appear from the opinion that exception had been taken to the introduction in evidence of a mortgage, without first producing or accounting for the note to secure which it was given, and Murray, C. J., said: "The mortgage was a mere incident to the debt, and in an order to maintain the action, which was founded on the plaintiffs' possession and the mortgage, the debt should have been proved."

In *Ord v. McKee*, 5 Cal. 515, the court said: "A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment. Ord, having the right to the note, had undoubtedly a right to foreclose the mortgage."

In *Guy v. Ide*, 6 Cal. 99 [65 Am. Dec. 490], the plaintiff had obtained an order appointing a receiver of the rents and profits of the mortgaged premises, pending a suit to foreclose the mortgage. On appeal, this court, *per* Terry, J., said: "Our statute forbids a mortgagee from recovering the mortgaged estate, and confines his remedy to a foreclosure. The same reason does



not, therefore, exist, as by the English rule, for appointing a receiver to collect the rents and profits, pending the litigation. The mortgage is considered as only the security for the debt; the estate remains that of the mortgagor, in the character of owner, and must continue to remain so, with all the incidents of ownership, until, by a foreclosure and sale, a new owner is substituted."

In *Phelan v. Olney*, 6 Cal. 478, the doctrine of *Ord v. McKee*, 5 Id. 515, and *Bennett v. Taylor*, Id. 502, was affirmed. In *Belloc v. Rogers*, 9 Id. 123, Burnett, J., said *arguendo*: "At common law, a mortgage vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent. But this theory is entirely changed by our system, and the legal title remains with the mortgagor, subject to be divested by a foreclosure and sale."

The decisions of this court from which the above citations are taken were made, with one exception, in equity cases; but the language of the court does not appear in any instance to have been governed by a consideration of the tribunal in which the remedy was sought, but entirely from a consideration of the nature of the contract.


The mortgage being a mere security for a debt, it must follow that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. Indeed, in those courts, with some few exceptions, where the common-law view of mortgages is the most strictly adhered to, payment of the debt is held to revest the estate without a reconveyance in the mortgagor, though it is difficult to see upon what principle. If the mortgage is a conveyance after default, it must be equally so before; the only difference being that in the one case the estate conveyed is conditional, and in the other absolute. If after default the estate be absolute, it is not easy to perceive how the grantee can be divested without deed under the statute of frauds; and yet, according to the general doctrine of the modern cases, payment has that effect. This is one of the inconsistencies arising from a partial adoption of the equitable doctrines by the courts of law.

In truth, the original character of mortgages has undergone a change. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They pass no estate in the land, but are mere securi-

ties; and default in the payment of the money secured does not change their character.

Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England, and in several of the states, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises for its satisfaction, the surplus, if any, going to subsequent incumbrancers or the owner of the premises, and execution following for any deficiency. And by the decision of this court in *Kent v. Laffan*, 2 Cal. 595, the statutory right of redemption is held equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law. Whether this decision would be now made, were the question an open one, it is unnecessary to determine. It has been repeatedly recognized as law by this court: *Harlan v. Smith*, 6 Id. 173; and has been acted upon by parties for years; rights of property have been acquired under it which we are not at liberty at this day to disturb. By this decision, the estate of the mortgagor and of the judgment debtor after sale stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it. The decisions as to the estate of the judgment debtor after sale become, therefore, authorities for determining the estate of the mortgagor after sale under decree; and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance, when executed, will take effect in the one case from the date of the mortgage, as it does in the other from the time the lien of the judgment attached.

By a statute of New York, passed in 1820, any creditor was entitled to redeem premises sold under execution, if he had a lien upon them by a decree in chancery or judgment at law, rendered before the expiration of fifteen months from the date of the sale. Under this act the question was raised in the courts of that state as to the estate of the purchaser previous to the execution of the conveyance, and as to the effect as liens of



decrees and judgments recovered after the sale; and it was held that until the deed was executed the purchaser had a lien only on the land: *Bissel v. Payne*, 20 Johns. 3; that the estate of the debtor was not changed by the sale and certificate of the sheriff, and the purchaser acquired no title until the conveyance was executed: *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 511; that the existence of the judgment at the time of the sale was not essential to the lien; that it became a lien if recovered within the fifteen months after sale: *Van Rensselaer v. Sheriff of Onondaga*, Id. 443; even though the judgment were confessed for the express purpose of enabling the creditor to redeem: *Snyder v. Warren*, 2 Id. 518 [14 Am. Dec. 519].

There is no difference, so far as the liens of the judgments are concerned, between our statute and that of New York. Here the statute requires the lien by the judgment of the creditor to be subsequent to that on which the property is sold; there the statute requires the judgment which creates the lien to be recovered before the expiration of the time of the redemption. The period within which the judgment creating the lien must be recovered is not limited in either case by the sale; and in *Kent v. Laffan*, 2 Cal. 595, the judgment under which a redemption was recovered after the sale of the premises under the decree of foreclosure, although this fact does not appear in the report of the case.

It follows from the views above expressed that the legal title of the premises remained in Randall after the sale, under the decree of foreclosure, and that the plaintiff acquired a lien by his judgments; the lien of the first judgment attaching on the seventh of February, 1855, and of the second on the twenty-first of July of the same year. The lien of this last judgment was extinguished by the sale under the Smith judgment, made on the twelfth of March, 1855, followed by a conveyance from the sheriff, which, by relation, took effect on the twentieth of February, 1855, when the judgment became a lien. The second judgment of the plaintiff could not therefore be available as a basis of redemption on the thirteenth of December, 1856; and the right of the plaintiff to redeem, as a creditor, must rest upon the first judgment. Upon this judgment execution had been issued, and the premises sold to the plaintiff on the seventeenth of March, 1856, for two thousand dollars, and it is objected by the defendants that this sale extinguished the lien of the judgment for the residue.

The question raised by this objection is not a new one. It

was before the court in 1853: *Vandyke v. Harman*, 3 Cal. 296. In that case the plaintiff was the holder of a mortgage to secure a note of one thousand five hundred dollars, and obtained judgment for the amount, and a decree for the sale of the mortgaged premises. At the sale he became the purchaser for one thousand dollars. The respondents, who were creditors of the mortgagor, having a lien upon the premises, paid to the sheriff the amount bid by the plaintiff, with eighteen per cent thereon, and interest to the date of the redemption, and claimed a deed. This the sheriff refused to execute, and the respondents applied to the court below, and obtained a *mandamus* to compel its execution. On appeal the judgment was reversed, and the court, *per* Heydenfeldt, J., said: "The sum paid to the sheriff to redeem the land was insufficient for that object. The whole amount of Vandyke's judgment, with interest, should have been paid. The language of the statute is explicit. If the interpretation insisted upon by the respondents be correct, that by the purchase of the property the lien of the creditor purchasing is gone, even for the purpose of redemption, then the statute would have no meaning whatever."

The same question was before this court for consideration in *Knight v. Fair*, 9 Cal. 117, and the decision in *Vandyke v. Harman*, *supra*, was affirmed. In *Knight v. Fair*, *supra*, the plaintiff was the owner of a judgment, and the purchaser of the real property sold. The successor of interest paid to the purchaser an amount greater than his bid, but less than the amount due on the judgment, and the payment was held insufficient for a redemption. In the opinion in the case, Burnett, J., said: "The two hundred and thirty-first section of the code allows the judgment debtor, or a redemptioner, to redeem within six months after the sale, by paying the purchaser the amount of his purchase, with eighteen per cent thereon in addition, together with any assessments or taxes, and interest on such amount; 'and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien with interest.'"

"It is certain, from this explicit language, that the purchaser may have a lien upon the property prior to that of the redemptioner. The fact that he is the creditor does not divest his lien. He may be both a creditor and a purchaser, and still have a prior lien to that of the redemptioner. This can only be upon the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed; and if in the debtor, it

is such an estate as may be the subject of a lien, a sale under execution, or of a conveyance by deed from the debtor. . . . We are compelled to give the statute this construction. If we do not, it has no meaning."

The cases cited by the counsel of the defendants from the New York reports are not in conflict with the decisions of this court. In *Hewson v. Deygert*, 8 Johns. 333, the purchaser was not the owner of the judgment. The premises were bid in by a third party. In such case the purchaser must take the property discharged of the lien of the judgment, otherwise no one would be safe in purchasing at a sheriff's sale for a sum less than the full amount of the judgment, as the property in his hands would be subject to resale as often as any balance remained unsatisfied. This is a very different question from the one involved in *Vandyke v. Harman*, *supra*, and in *Knight v. Fair*, *supra*, where the owner of the judgment became the purchaser. Besides, the only point decided in *Hewson v. Deygert*, *supra*, was that the court would not interfere in a summary way by rule to stay a second sale of the premises under the same judgment, the party with the title having a remedy by action in case of injury; and as to the effect of the sale in discharging the lien on the judgment, the court states expressly that it only intimates its impression and gives "no decided opinion."

In 1820 the legislature of New York provided, in the statute which authorizes redemptions, that "the plaintiff under whose execution any real estate shall have been sold shall not be authorized to acquire the title of the original purchaser, or of any creditor to the premises so sold, by virtue of the decree or judgment on which such execution issued:" 2 R. S. 373, sec. 58; and the decisions cited from Cowen and Wendell were made years afterwards. In *Ex parte Stevens*, 4 Cow. 133, the owner of the judgment was not the purchaser, and the decision was made in view of the provision of the statute, as is evident from the *syllabus* of the reporter. In *People v. Easton*, 2 Wend. 297, the sale under the execution was made for a sum exceeding the judgment, which was thus satisfied. The owner was, of course, no longer a creditor having a lien.

It is further insisted by the counsel of the defendants, that the time of redemption under the sale upon the judgment of the plaintiff having expired on the seventeenth of September, 1856, Randall became thereby divested of all interest in the premises, and there remained no interest in him on the thirteenth of December upon which the judgment could subsist as a lien.

The answer to this is, that the title remained in the debtor until conveyance executed. Until then the purchaser had no legal estate in the premises, but only a right to an estate which might be perfected by conveyance. This point was expressly decided in *Smith v. Colvin*, 17 Barb. 161. That was an action of ejectment, and it was objected to the plaintiff's recovery that his legal estate had become divested by a sale on execution, and the expiration of the time of redemption before trial, and the court said: "This ground is untenable, because the sale had not been consummated by sheriff's conveyance. . . . The title does not pass by filing the sheriff's certificate, which only operates as a lien by way of action to protect the purchaser against intervening claims, except the right of redemption. Nor does the estate of the debtor become vested in the purchaser by mere lapse of the time of redemption, but only, as we think, by the sheriff's conveyance under the statute:" *Vaughn v. Ely*, 4 Barb. 159.

The case of *Wright v. Douglass*, 2 N. Y. 373, does not, when properly considered, conflict with *Smith v. Colvin*, *supra*. The decision in that case was based upon the effect, under the statute of New York, of an attachment upon the equitable interest of the debtor in land. The objection of the defendant goes to the capacity in which the plaintiff undertook to redeem, and not to his right of redemption. If the lien of the judgment was extinguished by the lapse of the time of redemption, then the plaintiff was the successor in interest of Randall, and as such was equally entitled to redeem.

We do not perceive the force of the objection that the operative effect of payment as a redemption is to be determined by the capacity in which a party entitled to redeem presents himself before the officer. It can make no difference to the purchaser whether the money is paid by the plaintiff as successor in interest or as creditor having a lien.

The next question for consideration is, whether the payment of twenty-four thousand one hundred and forty-six dollars and eight cents, made on the thirteenth of December, 1856, operated as a redemption of the premises. The circumstances occurring at the time are detailed in the testimony of the sheriff, set forth in the findings of the court. From this it appears that on the evening previous the plaintiff, by his counsel, informed the sheriff of his intention to redeem the premises, and requested the officer to make out a statement of the amount necessary to be paid for the redemption. To this the officer, after some objection, assented, and on the following day made out the amount

at twenty-four thousand one hundred and forty-six dollars and eight cents. What then took place is thus stated by the officer: "Mr. Shafter said that was too much; that the amount required would not amount to seventeen thousand dollars, but he would pay whatever sum I demanded, and insisted I should name the amount. He paid me the amount, twenty-four thousand one hundred and forty-six dollars and eight cents; he protested against paying the amount; said it was too much; it was, at the same time, in the office; he requested me to give a statement of the items as I figured it up; there was a written protest served at the time Shafter asked me for the certificate; I think he prepared the certificate; I signed it; Shafter told me probably that was not the end of the matter, and requested me to deposit in Garrison & Co.'s, to save the interest during the litigation. About one week after, I deposited a portion with Tallant & Wilde, and a portion with Parrott & Co. . . . I mean by protest only that he said that the sum was too much. The written protest was after I had counted the money and found it correct. I read the certificate and signed it; can't say whether certificate was executed before protest or after. . . . I knew it to be correct. I selected my own bankers; Shafter advised me as to Parrott. There was no arrangement about the money. Shafter said a portion of the money was borrowed of Garrison & Co."

The written notice of protest, referred to in the testimony of the sheriff, specified the items to which objection was made. After the payment as described above, and at the same interview, the plaintiff requested the sheriff to deposit the money with Messrs. Garrison & Co., bankers, San Francisco, assigning as a reason that a part of the same had been loaned by them at two per cent per month, and would probably be tied up by litigation for several months, and by such deposit the interest could be provided for. On the twentieth of December the sheriff proceeded to San Francisco, from Marin county, and deposited a portion of the money with Tallant & Wilde, and a portion with Parrott & Co., receiving certificates of deposit for the same. Whilst the sheriff was in San Francisco, the plaintiff commenced a suit against him for the recovery of ten thousand dollars, as for money had and received to his use, and issued an attachment, and, according to the statement of the court in its finding, "caused the money so deposited to be attached in the hands of the bankers, to satisfy any judgment which he might recover in the action," and which "money remained so attached at the commencement and trial" of the ejectment suit. Afterwards.

On the seventeenth of February, 1867, the plaintiff filed a bill in equity, upon which an injunction was issued and served, restraining the bankers from using or paying out the moneys deposited, and the sheriff from negotiating the certificates of deposit. In the bill, which was duly verified, the plaintiff alleged that the sum of six thousand seven hundred dollars left with the sheriff was not due and payable as a portion necessary for the redemption, and that the sheriff had no right to the same. The suit in equity was undetermined, and the injunction in force at the commencement and trial of the ejectment case.

Upon these facts, the defendants contend that no redemption was made, and this involves the consideration of the effect of the protest upon the payment, the effect of the attachment upon it, and the effect of the injunction.

The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal. It is notice only to the party receiving the payment that if the demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion.

In *Fleetwood v. City of New York*, 2 Sandf. 475, Sandford, J., said: "The legal effect of the payment is not impaired by the protest made. When a party pays under duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right enforced by the adverse party. But where there is no legal compulsion, a party yielding to the assertion of an adverse claim cannot detract from the force of his concession by saying 'I object,' or 'I protest,' at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim:" See also *Chase v. Duval*, 7 Greenl. 134 [20 Am. Dec. 352]; *Clinton v. Strong*, 9 Johns. 370.

It is unnecessary to decide whether the protest, in the pres-

ent case, can be available for any purpose. It is of no consequence whether the payment was voluntary or otherwise. It was absolute, untrammelled by conditions. "There was no arrangement," testifies the sheriff, "about the money." Complaints of the amount required, objections in the words "I protest," whether made orally or in writing, were not clogs upon the absolute dominion of the officer over the money. He could have paid the same to the purchaser immediately, or on the following day, or at any time during the week. He received the money on the thirteenth, and no proceedings were taken against him for the alleged excess until the twentieth.

The attachment could not impair the legal effect of the judgment. It was not a recaption of the money, nor even a lien upon it. It is true, the court finds that the plaintiff caused the money in the hands of the bankers to be attached, and that the attachment remained upon it at the trial of the ejectment suit; but this finding is inconsistent with, and negatived by, the previous finding, that the bankers had already issued certificates of deposit to the sheriff for the money. These certificates are presumed to be in the ordinary form; it is not found that they were special and restricted in their character. They were then negotiable instruments under the statute, according to the decision of this court in *Welton v. Adams*, 4 Cal. 37 [60 Am. Dec. 579]; *Compiled Laws*, 146.

The bankers, by the certificates, became liable, not to refund to the sheriff the specific money deposited, but to pay its amount to the holder of the certificates on their presentation. After their issuance there was nothing in the possession of the bankers belonging to the sheriff upon which an attachment could fasten. There remained merely an obligation to pay the holder of the certificates, whoever he might be: *Sheets v. Culver*, 14 La. 449; *Kimbal v. Plant*, Id. 511. Whether the certificates could have been reached by any proceedings under attachment whilst in the hands of the officer, it is unnecessary to determine. No such proceedings were taken, and it is sufficient that the money deposited could not have been affected by the attachment. In the argument of counsel the character of the suit seems to have been lost sight of. The suit is not based upon any supposed present interest of the plaintiff in the specific money paid on redemption; it involves no assertion of title, but proceeds upon the relation of creditor and debtor. The complaint in the action alleges an indebtedness, and the words "had and received to the plaintiff's use" are put as the

consideration upon which to support the *assumpsit* on the part of the defendant. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiff's use. The argument attempted to be drawn from the technical language to qualify the payment is based upon a misconception of the nature of the action, and the character of the pleadings in it.

The bill upon which the injunction was issued alleges the facts in relation to the redemption of the premises and the subsequent deposit of the money with bankers in San Francisco, and the issuance of certificates by them, and as distinct grounds of the equity jurisdiction avers the irresponsibility of the sheriff and his sureties, and sets forth the various pretenses of Hyatt, that the redemption was imperfect and abortive; that the judgment under which it was made was fraudulent and void; that the amount paid was insufficient for redemption, or ineffectual, by reason of the protest, all of which pretenses, it says, are false in fact; and further avers that Hyatt has induced the sheriff, by giving a bond of indemnity to execute to him a deed of the premises, and yet insists that in case the redemption should prove effectual, he will be entitled to the sum of twenty-four thousand one hundred and forty-six dollars and eight cents. The bill concludes with a prayer for the injunction above mentioned, and that a receiver be appointed to take the custody of the certificates, and to hold the same for the purposes of the suit, and to invest the funds at interest pending the litigation; that an account of the money paid under protest be taken, and that the excess above the amount essential to effect a redemption be decreed to be paid to the plaintiff; and in the event the court should adjudge, for any reason, the redemption to be inoperative, then that the whole sum be decreed to the plaintiff; but in the event the redemption should be adjudged valid, then that so much of the amount as was essential for the redemption be paid to the parties entitled thereto.

To the bill the defendants demurred; some of them on the ground that it did not show any redemption by the plaintiff; and the others on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained on this last ground, and the bill dismissed.

The facts stated in the bill do not constitute a case for the cognizance of a court of equity. It does not present a case of trust. If the redemption was invalid, the plaintiff is entitled to the whole of the money; but if valid, and there was any excess

in the payment, he is entitled to such excess, assuming (for we do not attempt to decide the question) that the payment of such excess was by compulsion. In either case, the remedy at law is ample. Whatever hypothesis is taken, the sheriff can only be a debtor, either for the whole amount or for the excess, and his insolvency is no ground for the interference of a court of equity. The demurrer was therefore well taken.

As there was no ground for the equity suit, it can have no effect upon the validity of a transaction which was closed on the thirteenth of December previous, except as evidence of the intent of the parties at the time. And neither from the language nor scope and purpose of the bill can any inference be drawn against the absolute and unconditional character of the payment. It contains not a word which can be tortured into an admission against the claim of the plaintiff. That the parties entitled to the money may have been injured by the injunction is possible; but they have their remedy on the injunction bond. In *Ex parte Newell*, 4 Hill, 589, the creditor paid, unconditionally, to the sheriff the requisite amount for redemption, and immediately thereafter served an injunction in his own favor restraining the sheriff from paying it over; and it was held, nevertheless, that he was entitled to the sheriff's deed. The bill in that case was filed, and the injunction obtained in advance, forbidding the sheriff from paying over the money which the creditor might pay to effect the redemption until the further order of the court of chancery, and it was objected that in consequence of the service of the injunction there was no redemption; but the court, by Bronson, J., said: "Whether the injunction was properly issued or not is a question for the court of chancery. Assuming that it was regular, and that the money is stayed in the hands of the sheriff, we are still of opinion that there was a good redemption by Addington. He made an unconditional payment of the amount of the bank judgment, and the sheriff received and receipted the money before the injunction was served. The redemption was then complete, and subsequent service of process to stay the money in the hands of the sheriff could not undo what had already been well done. It is not like the case of a tender trammelled with conditions, or an offer of payment without parting with the money.

This authority is conclusive on the point in the case at bar. After a careful consideration of the objections of the learned counsel of the defendants, we are of opinion that the redemp-

tion of the thirteenth of December, 1856, was complete; and the subsequent attachment and injunction suits could not undo what was then well done.

In the *mandamus* case there is the further objection raised by the defendants, not involved in the determination of the other cases—that the proceedings were taken in the wrong county. The deed of the twenty-sixth of December was executed to the plaintiff in his capacity as purchaser. Sixty days having elapsed from the time of his redemption from the sale under the decree of foreclosure, he became entitled to a further deed as redeemer under section 232 of the practice act, and the proceedings were taken in the district court of San Francisco to compel the execution of the deed. The county where a cause is to be heard is to be determined, with some specified exceptions by the residence of the parties. The general rule under the statute in force at the time these proceedings were instituted is contained in section 20 of the practice act, which provides that the action shall be tried in the county in which the parties, or some of them, reside at its commencement. This case is not embraced by any of the exceptions, and therefore falls within the general rule. The second subdivision of section 19, which provides that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause, or some part of them, arose, applies only to affirmative acts of the officer, by which in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty: *Elliott v. Cronk's Adm'r*, 13 Wend. 35; *Hopkins v. Heywood*, Id. 265. Nor does the proceeding involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights, or in any respect affect the interests of third parties. The objection, therefore, to the county is untenable.

It follows from the views we have taken of these cases that the judgment in the ejectment case must be reversed, and the judgments in the other two cases affirmed. In the ejectment case all the facts are found by the court below, and it is the settled practice of this court, since the decision of *Holland v. San Francisco*, 7 Cal. 361, to direct in such cases, upon a reversal, the entry of the judgment warranted by the facts found. In *McMillan v. Richards*, therefore, the judgment is reversed, with directions

to the court below to enter judgment in favor of the plaintiff for the possession of the premises described in the complaint, and the recovery of the damages assessed for their use and occupation. In the other two cases the judgment is affirmed.

TERRY, O. J., and BURNETT, J., concurred.

MORTGAGE IS BUT MERE SECURITY FOR PAYMENT OF DEBT. It does not pass title to the land, but is only an incumbrance or lien upon it: *Peters v. Jamestown Bridge Co.*, 63 Am. Dec. 134; *Duty v. Graham*, 62 Id. 534; *Burke v. Cruger*, 58 Id. 102; *Godeffroy v. Caldwell*, 56 Id. 360, and note, where prior cases are collected. But see *Buck v. Swazey*, Id. 681, where it is held that mortgage notes are the principal, and the land is merely accessory thereto. See also *Frische v. Kramer*, 47 Id. 368.

MORTGAGOR MAY SELL EQUITY OF REDEMPTION to mortgagee, but he is entitled to every favorable consideration on account of the unequal relation of the parties: *Hyndman v. Hyndman*, 46 Am. Dec. 171. The grantee of equity of redemption has a right to redeem, notwithstanding a foreclosure and sale, unless he has been made a party to the suit: *Bradley v. Snyder*, 58 Id. 564. And the grantee of a mortgagor's equity of redemption is not barred of his right to redeem by a purchase of the mortgaged premises made by the holder of a mortgage debt: *Moore v. Anders*, 60 Id. 551.

PAYMENT OF MORTGAGE DEBT EXTINGUISHES MORTGAGE which is security for it: *Bowman v. Manter*, 66 Am. Dec. 743; *Gale v. Mensing*, 64 Id. 197; *Ryan v. Dunlap*, 63 Id. 334, and note, where prior cases in this series are collected.

PURCHASER'S TITLE UNDER JUDGMENT RELATES BACK TO INCEPTION OF LIEN, and is paramount to any title based on a prior levy and sale under a junior judgment: *Andrew v. Wilkes*, 34 Am. Dec. 450; *Rogers v. Brent*, 50 Id. 422, and note, where prior cases are collected; *Stout v. Keyes*, 43 Id. 465.

LIEN OF SENIOR JUDGMENT LOST BY SALE OF PREMISES UNDER JUNIOR JUDGMENT AND EXECUTION: *Harrison v. McHenry*, 52 Am. Dec. 435, and note; *Jones v. Judkins*, 34 Id. 392. But *contra*, see *Commercial Bank v. Yazoo County*, 38 Id. 447, and note; *Andrews v. Doe*, Id. 450, and note; *Bank of Missouri v. Wells*, 51 Id. 163.

RECOVERY OF MONEY PAID UNDER COMPULSION: See note to *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 153, where the question is discussed at length; *Altson v. Durant*, 49 Id. 596.

THE PRINCIPAL CASE IS CITED in *Gregory v. Higgins*, 10 Cal. 340, to the point that attachment cannot fasten on funds in a banker's hands for which negotiable instruments have been given; in *Mills v. Barney*, 22 Id. 249, and *Poorman v. Mills*, 35 Id. 120, to the point that certificates of deposit are negotiable instruments; in *Haffley v. Maier*, 13 Id. 14; *Johnson v. Sherman*, 15 Id. 293; *Goodenow v. Ewer*, 16 Id. 467; *Fogarty v. Sawyer*, 17 Id. 592; *Lord v. Morris*, 18 Id. 488; *Dutton v. Warschauer*, 21 Id. 621; *Kidd v. Temple*, 22 Id. 262; *Bludworth v. Lake*, 33 Id. 264; *Heyland v. Badger*, 35 Id. 413; *Jackson v. Lodge*, 36 Id. 39, 42, 58, 59; *Mack v. Wetzler*, 39 Id. 254, 255; *Ladue v. D. & M. R. R. Co.*, 13 Mich. 396, to the point that a mortgage is a mere security, passes only a chattel interest, leaving the legal title in the mortgagor; in *Nagle v. Macy*, 9 Cal. 428, to the point that a mortgagee can only obtain title to the land at foreclosure sale; but in *Green v. Butler*, 26 Id. 602,

this broad declaration is limited to the question under discussion, and it is declared that the judge "had no reference to a contract affecting the title made by the mortgagor himself subsequent to the making of the mortgage. Reference was only made to the possibility of acquiring title through the mortgage independent of any further action on the part of the mortgagor." In *Dutton v. Warschauer*, 21 Cal. 623, the principal case is cited with approval to the point that payment of a mortgage debt extinguishes the lien of a mortgage; in *Willes v. Farley*, 24 Id. 498, to the point that when a debt is barred by the statute the remedy on the mortgage is also barred, because the mortgage is only an incident to the debt; in *Montgomery v. Tutt*, 11 Id. 317, to the point that the foreclosure clause as to equity of redemption, in a decree, is a useless formula; in *Gross v. Fowler*, 21 Id. 395, and *Stout v. Macy*, 22 Id. 650, that all judicial sales are alike entitled to the same right of redemption as a foreclosure sale; in *Cummings v. Coe*, 10 Id. 531, *Goodenow v. Ewer*, 16 Id. 469, and *Page v. Roberts*, 31 Id. 301, that the legal title does not pass in foreclosure sale until the delivery of the sheriff's deed, and then by relation dates back to the date of the mortgage; in *Falkner v. Hunt*, 16 Id. 170, *Brumagin v. Tillinghast*, 18 Id. 274, and *Meek v. McClure*, 49 Id. 627, to the point that for money paid under compulsion an action in *assumpsit* for money had and received lies for its recovery; in *McMillan v. Vischer*, 14 Id. 240, to the point that payment to a sheriff to redeem property sold under execution is not compulsory; and in *Bucknall v. Story*, 46 Id. 597, S. C., 13 Am. Rep. 224, to the point that the object of a protest is to take from a payment its voluntary character, and thus conserve to the party a right of action to recover back the money; that it is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation, and has no application to voluntary payments.

NASH v. HERMOSILLA.

[9 CALIFORNIA, 584.]

LIQUIDATED DAMAGES OR PENALTY.—Where defendant agreed to erect a building on such a portion of a lot as would be satisfactory to plaintiff, and give him possession in three weeks, to hold for six months with privilege of twelve months, and upon failure to perform the agreement to pay the sum of five hundred dollars damages: *Held*, that the sum named was a penalty, and not liquidated damages.

ACTION of damages for breach of contract. The court below decided that the sum named in the obligation sued on was a penalty, and not liquidated damages, and plaintiff appealed. The opinion states the terms of the contract.

J. H. McKune, for the appellant.

Cross and Marshall, for the respondent.

By Court, **BURNETT, J.** The cases upon this subject are numerous, and it is difficult to deduce from them any certain and definite rule; in fact, the transactions of individuals are so vari-

ous, and the circumstances of many cases so peculiar, that no certain rule can be adopted for all cases. But from the decisions, the following results seem to be substantially correct:

1. When the party stipulates to pay a stated sum for a given period of time during the continuance of the failure, then the damages are to be considered as liquidated: *Aylet v. Dodd*, 2 Atk. 238; *Fletcher v. Dyche*, 2 T. R. 32; *Smith v. Smith*, 4 Wend. 468.

2. When the agreement is not to carry on trade at a particular place; not to run a stage-coach on a particular road; not to publish a rival newspaper; not to run a rival steamer on a particular route;—in all these cases the sum stated must be taken as liquidated damages: *Green v. Price*, 13 Mee. & W. 695; *Leighton Wales*, 3 Id. 545; *Williams v. Dakin*, 22 Wend. 201; *California Steam Nav. Co. v. Wright*, 6 Cal. 259 [65 Am. Dec. 511].

3. When the party stipulates to marry no other person; to convey land, or pay a named sum, the price of the land having been received by him—the damages are liquidated: *Lowe v. Peers*, 4 Burr. 2225; *Slasson v. Beadle*, 7 Johns. 71.

4. When a named sum is to be paid for every acre of land plowed up contrary to agreement; when a stated sum is to be paid for each article not delivered—the damages must be considered as liquidated.

5. When the party stipulates to erect a building in a particular manner, within a given time, and upon failure to pay a named sum, it must be considered in the nature of a penalty: *Tayloe v. Sandiford*, 7 Wheat. 13; *Moore v. Platte County*, 8 Mo. 467.

In *Tayloe v. Sandiford*, *supra*, Chief Justice Marshall said: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. . . . It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them to show that they were so considered by the contracting parties."

The present case seems to fall within the rule applicable to building contracts. In this case the defendant stipulated that she would erect a brick building to cover such portion of the lot as would be satisfactory to plaintiff, and give him possession within three weeks; the plaintiff to have possession for six months, with the privilege of twelve months or more; and upon failure to perform the agreement, she was to pay to plaintiff the sum of five hundred dollars damages.

It will be seen that there are several things for the defendant to do, a failure to perform any of which would have been a

violation of the agreement. If the building had been erected upon a portion of the lot not satisfactory to the plaintiff, or the house not furnished for a single day beyond the stipulated time, the defendant would have been liable for the whole sum, upon the theory of the plaintiff's counsel. So, too, if the plaintiff had been disturbed in his possession for one day during the term of six months, or denied the privilege of the additional term. There is no statement in the agreement that the sum was to be taken as liquidated damages. If the defendant had failed to erect a suitable brick building, although finished within the time specified, it would have been a violation of the contract.

We are of opinion that the damages mentioned were not liquidated, but a mere penalty to secure the performance of the contract, or the payment of such damages as the plaintiff might be entitled to under the circumstances. In building contracts, it may be difficult to say what amount of injury the plaintiff has sustained by reason of the non-completion of the building within the exact time stated. And yet this difficulty in ascertaining the amount of the injury occasioned by the delay has not induced the courts in such cases to consider the sum as liquidated damages.

Judgment affirmed.

TERRY, C. J., concurred.

SUM NAMED, WHEN DEEMED PENALTY, AND WHEN LIQUIDATED DAMAGES: *Foley v. McKeegan*, 66 Am. Dec. 107, and note; *Geiser v. Carter*, Id. 71, and note; *Cal. Steam Nav. Co. v. Wright*, 65 Id. 511, and note; *Curry v. Larer*, 49 Id. 498; *Baird v. Tolliver*, 44 Id. 298, and note collecting former cases.

LAFFAN v. NAGLER.

[9 CALIFORNIA, 661.]

COVENANT IN LEASE TO LESSEES, "THEIR HEIRS AND ASSONS," that in the event of a sale by the lessor the lessees should have the refusal of the property, is a covenant running with the land.

COVENANT IN LEASE, RELATING TO THING DEMISED, attaches to the land, and runs with it.

BUSINESS RELATIONS CONSTITUTING PARTNERSHIP.—N. and L. agreed that L. should advance twelve thousand dollars to commence erecting a house on land held by N. under lease; that N. should then convey a half-interest in the property to L.; that both should finish the building at a cost of eighteen thousand dollars each, and should divide the rents received from it thereafter: *Held*, that N. and L. were copartners.

PARTNER IN LEASEHOLD PURCHASING FEE in his own name, with his own money, the lessees being entitled to a refusal of the property, purchases for both, and the other partner becomes entitled to his share upon payment of his proportion of the purchase money.

SOLE MANAGING PARTNER'S RELATION TO COPARTNER IS ONE OF GREAT CONFIDENCE, and requires the utmost good faith; and proof must be clear to show that the copartner has waived any of his rights to property legally inuring to the partnership.

DEDICATION OF PARTNERSHIP PROPERTY BY MANAGING PARTNER TO STREET PURPOSES, to render the remaining portion more valuable, inures to the benefit or detriment of all the partners in proportion to their shares.

PARTNER ADVANCING FUNDS will not be allowed compound interest.

PARTNER RECEIVING MONTHLY RENTS IS CHARGEABLE WITH INTEREST from date of receipt until paid over to the partnership.

MRS. HINKLEY leased to Ward and Smith the premises in question for eight years, at three hundred dollars per annum. By the terms of the lease the lessees were permitted to erect such buildings on the land as they saw fit, and in the event of sale by the lessor, were to have the refusal of the property. Ward and Smith assigned the lease to Naglee, who entered into an agreement with Laffan, whereby Laffan was to furnish twelve thousand dollars toward building a house on the leased premises. Naglee was then to deed one half of the lease to Laffan, and the further cost of the building was to be borne equally by them. The contract was executed, the building costing forty-eight thousand dollars. The lease had four years yet to run at this time. The same year Naglee had Bolton, Baron, & Co. purchase the land in fee for his benefit for seventeen thousand dollars. They immediately deeded the property, except a strip forming part of Merchant street, to Naglee, taking a mortgage for thirty thousand dollars, money loaned to Naglee. The seventeen thousand dollars purchase money was paid out of this loan. Laffan filed his bill for a settlement of the joint transactions, and to compel Naglee to convey to him an undivided half of the premises. He obtained a decree in the court below, and the defendant appealed.

J. G. Baldwin and Delos Lake, for the appellant.

Hoge and Wilson, for the respondent.

By Court, BURNETT, J. . The first and most important question arising in this case is, whether, by the legal effect of the assignment, the right to purchase the fee of Smith and wife passed to Laffan and Naglee.

It is insisted by the learned counsel for the defendant that this pre-emptive right was a personal privilege, appertaining alone to the first lessees, and not assignable by the terms of the original lease; that it "was a mere possibility; it was an intangible, unenforceable obligation; it was, for any practical purpose, valueless, and could not have entered into the minds of the parties making the arrangements under the lease." The substance of the privilege is well stated by the counsel in these words: "If lessor chooses, at any time hereafter, to sell, and should offer the property for sale, on such terms as she may choose, lessee may have the liberty of buying it in preference to any one else."

It is certain that this privilege entered into the minds of the original parties to the lease, and was considered of value by them; otherwise there could have been no reason for its insertion in the lease. It will be seen that the tenants were authorized to make whatever improvements they pleased, which improvements were to become fixtures when the lessor paid for them. By the legal effect of the lease, Mrs. Hinkley was not bound to take the improvements at their value, but she had the privilege of doing so. If she did not choose to take them, then the tenants had the right to remove them. They were only to become fixtures provided she paid for them. If she did not choose to take them, then the tenants had only the rights that belonged to them, as if this stipulation was not in the lease. On her part she stipulated to give the tenants the preference of purchase should she determine to sell during the term.

That this privilege was practically valuable is apparent from those considerations. The lease was on long time, at a low rent. If rents should go down, this privilege could not prejudice the tenants; but if they remained as they were, or went up, then this pre-emptive right became more valuable. As the lessor was receiving very low rent, paying scarcely any interest upon the value of the property, she would naturally be induced to sell upon very favorable terms, that she might invest the proceeds in more productive property. The tenants had a most complete check upon her asking an exorbitant price for the property. The practical result proved this, as Naglee purchased the reversion for seventeen thousand dollars, when he had previously given Ward forty-two thousand dollars for the leasehold interest. She was receiving only three hundred dollars per annum rent, while the interest upon the seventeen thousand dollars at two per cent per month, the then current rate, would have been upwards of four thousand dollars yearly. It was greatly to the

interest of the tenants to purchase in the fee, as the lessor might not be willing to take the improvements at their value, and then they could only remove them at the termination of the lease. In every practical view that can be taken of this privilege, it was valuable; and when rents went up as high as they did, it became of great value. For this reason, the assignees of the original tenants must have considered it a matter of the greatest importance to them. The privilege of having the refusal of a purchase under circumstances that in the nature of things must compel the owner to sell at a very low price was a most valuable one practically, and never could have been disregarded by the purchaser, of the leasehold interest: *Jackson v. Schutz*, 18 Johns. 174 [9 Am. Dec. 195]; 1 Powell on Mortgages, 195, note; *Goodtitle v. Luxmore*, 16 East, 87.

As regards the question whether this covenant in the lease would pass to the assignees of the original tenants, that depends upon the fact whether the covenant ran with the land.

In the opinions of the judges, delivered in the case of *Vernon v. Smith*, 5 Barn. & Ald. 1, the doctrine upon this subject is very clearly stated. Mr. Justice Bayley said: "The rule is, that if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assignee, it passes to his assignee." In that case the covenant was to insure the premises against fire. Mr. Justice Holyrood adopts the rule laid down by Lord Chief Justice Wilmot, that "covenants in leases, extending to a thing *in esse*, parcel of the demise, run with the land, and bind the assignee, though he be not named, as, to repair, etc. And if they relate to a thing not *in esse*, but yet the thing to be done is upon the land demised—as, to build a new house or wall—the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised—as, to build a house on other land, or to pay a collateral sum to the lessor—the assignee, though not named, is not bound by such covenants."

Mr. Justice Best, in his opinion, refers to and adopts the opinion of Gawdy, J., in *Spencer's Case*, in which it was said "that a covenant that the lessor will, at the end of the term, grant another lease runs with the land. The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end; but it is beneficial to the owner, as owner, and to no other person. By the terms 'collateral covenants,' which

do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estates. This principle will reconcile all the cases." The lease of Mrs. Hinkley was to Ward and Smith, their heirs and assigns. Every covenant in the lease relating to the thing demised attached to the land, and ran with it. This valuable privilege of pre-emption attached to the entire property, and therefore was assignable. It would have been of much less value to Ward and Smith if they could not have assigned it to those who purchased of them.

There would seem to be no doubt as to the assignable character of this covenant: Woodfall on L. & T. 278, 284; *Jackson v. Churchill*, 7 Cow. 287 [17 Am. Dec. 514]; *Duffy v. Buchanan*, 1 Paige, 455. The case of *Anderson v. Lemon*, 4 Sandf. 552, S. C., 8 N. Y. 237, and the cases cited by the court, are clearly distinguishable from the circumstances of this case. The case from Sandford differed from the present case in these material circumstances: 1. The main business of the partnership was the manufacture of tobacco, and the lease was a mere incident to the trade; 2. The improvements at the end of the term belonged to the landlord; 3. The original term of copartnership had expired, and the copartnership was continued from day to day, at the will of the parties, pending negotiations for a new copartnership upon different terms; 4. There was no pre-emptive privilege in the lessee. The decision of the supreme court was reversed by the court of appeals, upon the ground that the acts of the partner purchasing the fee were fraudulent. The court of appeals held that "a copartner was at liberty to make the purchase stated in that case, under circumstances free from deception and fraud, and consequently to retain it.

As the covenant in reference to this pre-emptive right of purchase constituted an essential part of the lease itself, and therefore ran with the land, the several assignments made by Ward, Smith, and Naglee were ample to carry to the assignees, respectively, this right. Unless there had been a clear and unmistakable reservation of this privilege in the assignment, it must have passed along with the leasehold interest to the assignee.

The second question arising in this case is whether the purchase by Naglee of the fee in his own name, and with his own money, inured to the equal benefit of Laffan. This question is naturally divisible into two heads: 1. Were Naglee and Laffan copartners? 2. If so, did Laffan, under the circumstances of this case, waive his rights?

We think there can be no doubt as to the question of copartnership. We have substantially decided this point in the late case of *Gray v. Eaton*, 5 Cal. 448. In that case we held that there could be a partnership in the purchase and sale of lands, and we can see no difference in principle between such a partnership and that in the joint purchase, improvement, and leasing of property for profit. All the circumstances necessary to constitute a partnership existed in this case. The copartners contributed equal portions of the cost of the property, and then divided the net profits arising from the rents. The purpose of the arrangement was the profit to be derived from the property when leased to others, and not the enjoyment or use of it by the individual copartners themselves. The property was purchased and improved for the purpose of carrying on the regular joint business of leasing the same for profit. The relation the parties sustained to each other was not that of mere tenants in common; it was something more: it was that of partners. The question as to whether Laffan waived his right to share in the fee is one of some difficulty. In considering this point, we must keep in view the facts that the parties were copartners; that this pre-emptive right was a part of the partnership property, and that Naglee was the sole managing partner. The relation that Naglee sustained to Laffan was one of great confidence, requiring the utmost good faith on the part of Naglee. The proof, therefore, that Laffan waived his right must be clear.

The plaintiff alleges in his complaint that the purchase of the property, through Bolton, was made clandestinely, by Naglee, with intent to defraud his copartner. The deed from Smith and wife to Bolton was acknowledged and recorded October 15, 1851. The deed from Bolton to Naglee was acknowledged on the eighteenth of December, 1851, and recorded on the nineteenth. The mortgage from Naglee to Bolton was acknowledged on the fifteenth of October, 1851, and recorded on the nineteenth of December, 1851. It was shown that Laffan left San Francisco for New York on the sixteenth of December, 1851, and returned November 1, 1854. In reference to the two deeds and the mortgage, Mr. Bolton testified that they were to have been executed all on the one day; that he had supposed they were so consummated, but could not then assign a reason why they were not.

These circumstances certainly made out a *prima facie* case of fraudulent concealment. In his answer, Naglee alleged that

Laffan had notice of his intention to purchase the property on his own account; that Laffan declined to join in the purchase; and he accordingly purchased for himself. To sustain this allegation, and to disprove the alleged fraudulent concealment, Naglee produces in evidence, with the consent of the plaintiff's counsel, a letter written by Laffan, on board the steamer Panama, off San Diego, and dated December 17, 1851. Before leaving, Laffan had appointed Isaac E. Holmes his agent and attorney, and the letter was addressed to him. After stating that, "leaving in a hurry, he may have omitted many things," and after referring to some other matters, the letter contains this reference to the purchase of the fee:

"Naglee told me Bolton, Barron, & Co. bought the ground on which our building and his, on the corner, stands, for, I think, seventeen thousand dollars, and that my portion would be one fourth. Considering that I had already paid twelve thousand dollars for the lease, I thought the one fourth more than my proportion; but when I was prepared, I would be willing for two persons to say what it should be. Admitting my account, which must be insisted on, he ought to owe two thousand dollars for rent account to first of December, if all be collected, besides the current rents."

In the same letter he states his "aim shall be directed to procure, if no more, ten or twelve thousand dollars, in order that you may, by your management, save the brick house for my children. This will be important; and let other matters take their course."

If we take this language, in connection with the established facts, then the following conclusions seem plainly to flow from it: 1. That Laffan knew that Bolton had purchased the fee of the entire property for seventeen thousand dollars; 2. That the purchase was made for him and Naglee in their respective proportions; 3. That Naglee and Laffan did not agree about the proportion of the seventeen thousand dollars to be paid by Laffan; 4. That Laffan was to pay his rightful proportion when he was prepared; 5. That Laffan's first object was to save the property for his children.

This letter clearly disproves Laffan's allegation of fraudulent concealment, while it as clearly disproves Naglee's allegation that he told Laffan he intended to purchase on his own account, and that Laffan declined to join in the purchase. Both parties seem to have forgotten some of the circumstances. This was not at all surprising, as both parties had passed through a severe

financial ordeal, and their complex transactions had taken place some four years before the commencement of the suit.

There was nothing suspicious in the fact that Naglee took the deed from Bolton in his own name. Naglee had about five-sixths interest in the fee, and became solely accountable to Bolton for the loan of the purchase money. Besides this, it would have required separate deeds from Bolton, and separate mortgages back to him. Laffan being then very much embarrassed in his circumstances, and the purchase being made on credit, it was very natural that Naglee should not be willing to be solely bound for the purchase money without any security, and it was equally proper that Laffan should have consented to this form of the conveyances.

For the purpose of showing that Laffan had waived his right to participate in the purchase of the fee from Smith and wife, the defendant gave in evidence a copy of a written proposition, dated November 3, 1853, and signed alone by Naglee, wherein he recites that Holmes claimed the interest of Laffan in the leasehold property; that Laffan disputed Holmes's claim; that the fee of the property was then in Naglee; and then goes on to state that in consideration of one dollar paid by Laffan to him, and divers other good considerations, Naglee agreed to sell one half the fee of the lot for the sum of ten thousand dollars, one half payable within nine months, and the other half out of the first rents thereafter accruing to Laffan. Naglee left the writing with Laffan and kept no copy, but afterwards wrote Laffan for a copy, which was furnished in the handwriting of Laffan, and this copy was given in evidence.

It was also insisted by defendant that Laffan had lost his right by delay.

It was admitted by the parties on the trial that Isaac E. Holmes, the attorney in fact of Laffan, had "so managed the affairs of Laffan as to procure or suffer certain judgments to be rendered against said Laffan, under which the leasehold in the property in controversy was sold, and purchased by Holmes for his own use; and that shortly after the departure of Laffan, Holmes claimed the property for himself until July 31, 1854, when Laffan instituted a suit against said Holmes, in which said Naglee was appointed receiver; and such proceedings were had that in the fall of 1855 the purchases by Holmes were set aside as fraudulent and void, and said Laffan restored to his property," etc. The original complaint in the case of *Laffan v. Holmes*, charging fraud against Holmes, was verified by the affidavit of

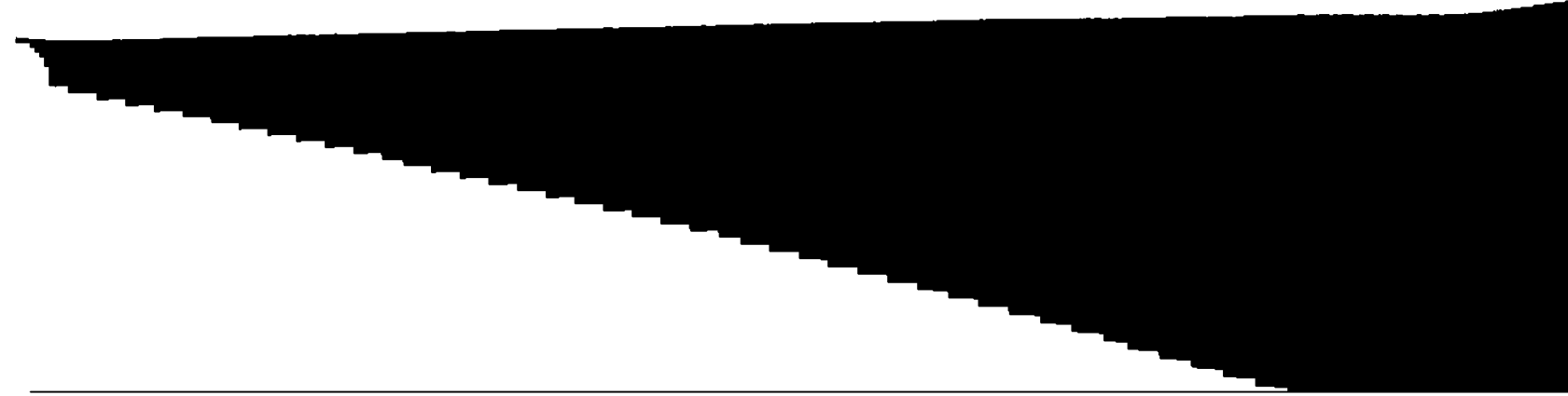
Naglee, who acted as the agent of Laffan, stating in the affidavit "that the facts, matters, and things mentioned and alleged in the complaint were peculiarly within the knowledge of affiant."

The copy of the proposition of Naglee was indorsed in his handwriting, as follows: "A proposition—H. M. Naglee to E. Laffan, November 3, 1853, for nine months."

This proposition was made to Laffan in New York about a year before his return to San Francisco, and while Holmes was in possession of Laffan's leasehold property, and receiving all the rents. The only proof that Laffan ever accepted the proposition is the fact that he had it in possession and sent Naglee a copy at his request. There is no proof that he acted upon it in any way. At the time it was made the circumstances were such that he could not act. Under these circumstances, we cannot infer that the proposition was accepted. It is true that it gave notice to Laffan of the fact that the property was then held in the name of Naglee. But he was not in a condition at that time to accept or reject. Nor was Naglee in a condition to comply. This seems evident from a clause in his proposition. He first states that Laffan contemplated proceedings against Holmes to controvert his claim to the property, and then, in the close of the proposition, states: "But it is expressly understood that if the legal proceedings aforesaid should be abandoned before the time aforesaid, then this agreement should be void." From this condition, it seems evident that Naglee at that time supposed that he held the legal title for the party entitled to the leasehold interest, and that he wished to reserve the undivided half in his own name until it was ascertained whether Holmes or Laffan was the proper party to receive the deed.

As regards the alleged delay, we think there is nothing in the objection when the circumstances are considered. Laffan left December 16, 1851, and his agent, Holmes, very soon so managed matters as to become himself apparent owner of the property; and it was not until the fall of 1855 that the question with him was set at rest. From that period until the commencement of this suit (February 5, 1856), there was not more than a reasonable time for consulting with counsel and preparing the papers for this suit.

The property in the fee having been originally purchased for the benefit of both parties, in accordance with the terms of the lease, it still retains the character of partnership assets, and the *onus* of proving that Laffan had waived his right resting upon the defendant, and his proofs not sustaining his allegations in



this respect, the interlocutory decree of the court below was correct.

It now becomes necessary to notice the exceptions made by defendant to the report of the referee.

The first exception regards the original proportion of the whole purchase money of seventeen thousand dollars, which Laffan was bound to pay. The referee adopted this mode: He deducted from the costs of the fee of the entire demised premises the proportionate value of the strip of twenty-eight feet nine inches, dedicated for Merchant street. The whole lot described in the lease of Mrs. Hinkley fronted sixty-eight feet nine inches on Montgomery street, running back one hundred and thirty-seven feet six inches. The strip twenty-eight feet nine inches by one hundred and thirty-seven feet six inches was taken from one side of the lot, for a street, in November, 1850. Naglee at that time received from various parties altogether the sum of ten thousand six hundred dollars for opening Merchant street.

It is insisted by the learned counsel for the plaintiff that the street was dedicated in 1850, in anticipation of Naglee's purchasing the fee; and that when he obtained the fee, "he yielded the dedication of the street as a thing of course—as a matter of mere duty and obligation, for which he was prepaid."

But this ground does not seem to be well taken. It seems clear that Naglee was only paid the value of the interest he then held in the strip, and no more. He paid for the whole leasehold property forty-two thousand dollars, and estimating his leasehold interest in the strip dedicated for the street at its proportionate value, the amount exceeds seventeen thousand dollars, when he only received ten thousand six hundred dollars. The difference was no doubt made up of his own portion of the contribution. Those who paid him no doubt knew that Smith and wife must sell, and Naglee must buy, and that when the street was once open, whoever did purchase the fee of the demised premises would be compelled, by their own interest, to keep open the street, otherwise the rear of the property could not be approached. But there is no evidence to show that Naglee agreed to purchase this strip, or that in case he did purchase it he would continue the dedication. There was no obligation imposed upon Naglee to dedicate the fee, and when he did so dedicate it, it was for the common benefit of the property, in proportion to the respective interests of himself and Laffan. If Laffan asks to share the benefit of this dedication, he should bear his proportion of the price. The seventeen thousand dollars should have been estimated as the cost of the lot forty by

one hundred and thirty-seven feet six inches, and the relative proportion of the purchase money ascertained upon that basis. It is clear that Laffan had the benefit of the street up to the termination of the lease; and if he asks an interest in the fee, he must bear his share of the costs of that which renders his own portion valuable. We think the referee erred in this respect, and this exception should have been allowed.

The second exception to the report of the referee is, that Naglee was not allowed compound interest. This exception, we think, is not well taken.

The third exception is, that the referee credited the plaintiff with fifty dollars per month ground-rent from October 15, 1851, to April 9, 1855, the time of the expiration of the lease, with the interest upon each month's rent. It is stated by the learned counsel for defendant that the referee estimated the amount of this ground-rent which Naglee was compelled to refund at four thousand two hundred dollars principal, and three thousand seven hundred and eighty dollars interest, making in all the total sum of seven thousand nine hundred and eighty dollars. The counsel has not referred us to the page of the record; but if his statement is correct as to the amount, the referee has charged Naglee more than double the proper sum. The rent, at the rate of fifty dollars per month for the time specified, would not quite amount to two thousand one hundred dollars, exclusive of interest. As to the principle requiring the ground-rent to be refunded, we think there was no error in the report of the referee.

The other exceptions to the report we think not well taken.

For the reasons stated, the judgment must be reversed, and the cause remanded for further proceedings.

TERRY, C. J., concurred.

ESSENTIAL QUALITY OF REAL COVENANT is that it relates to the realty, having for its object something annexed to, or inherent in, or connected with, the land or other real property: *Mores v. Garner*, 47 Am. Dec. 565, and note 569. And there must be privity between the grantor and grantee: *Ross v. Turner*, 4 Id. 531.

PERSONS HAVING COMMON INTEREST IN PROFITS AND LOSSES of a business are partners [as between themselves: *Ellsworth v. Tarr*, 62 Am. Dec. 749; *Griffith v. Bufum*, 54 Id. 64; *Bartlett & Co. v. Jones*, 49 Id. 606, and note 608, where other cases are collected; *Price v. Alexander*, 52 Id. 528.

PARTNER ADVANCING FUNDS IS ENTITLED TO INTEREST FROM TIME OF ADVANCEMENT: *Hodges v. Parker*, 44 Am. Dec. 331; but see, *contra*, *Holden v. Peace*, 45 Id. 514, and note. The facts in the principal case are compared with and distinguished from those in *De Rutte v. Muldrow*, 16 Cal. 513, and *Hitchcock v. Page*, 14 Id. 444.

that could pass to the purchaser by the sale and deed of the sheriff. In the case of *Petit v. Shepherd*, 5 Paige, 501, where the lien of a judgment had expired, and the debtor then sold the property, it was held that a bill to restrain the creditor from selling under the judgment would lie.

But we think this case a much stronger one than either of the two above mentioned. By section 2 of the "act defining the rights of the husband and wife," Wood's Dig. 487, it is provided that "all property acquired after the marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." And by section 9 the husband has the absolute power of disposition of the common property during the marriage, as of his own separate estate.


The right of the wife to acquire property by purchase during the marriage can only exist as an exception to the general rule as laid down in section 2. This exception exists in the case of a sole trader under the statute. The property in this case, having been conveyed to the plaintiff during the marriage, was *prima facie* common property, and subject to the disposition of the husband. A sale and deed by the sheriff would convey to the purchaser a *prima facie* title, which the plaintiff would have to overcome by proof. In a suit by the purchaser under execution to recover possession of this property, he would have on his part to prove, first, the marriage; second, the conveyance to the wife; third, the conveyance to him; fourth, possession in defendants. This would give him a *prima facie* right to recover. To overcome this *prima facie* case, the wife would have to show that she was a sole trader at the time of the conveyance to her; and to prove that she was such, she must show that she complied with the conditions prescribed by the statute. In her answer she would have to set up this claim as new matter, and sustain it by proof.

Judgment reversed, and cause remanded.

TERRY, C. J., concurred.

INJUNCTION WILL ISSUE TO RESTRAIN CREDITOR OF HUSBAND from selling, under an execution, property belonging to the wife: *Scheferling v. Huffman*, 62 Am. Dec. 281; and that an injunction will be granted to secure the enjoyment of a statutory privilege, see *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.*, 42 Id. 716.

SHERIFF'S DEED IS PRIMA FACIE EVIDENCE OF TITLE in the purchaser: *Bettison v. Budd*, 65 Am. Dec. 442, and note 452.



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KENDALL v. CLARK.

COURT WILL INTERFERE BY INJUNCTION TO PREVENT UPON TITLE to land when the cloud, if cast, would be v. *C. P. R. R. Co.*, 2 Saw. 514, citing the principal case.

MARRIED WOMAN WHO HAS FILED HER DECLARATION as a TRADER, and doing business as such, under the statute, possessing the rights, powers, and privileges, and subject in respect to her business and property that she would be to were she unmarried: *Camden v. Mullen*, 29 Cal. 564. Deeded to the wife during coverture is *prima facie* correct when she claims it as a sole trader, the burden of proof to prove: *Adams v. Knowlton*, 22 Id. 288, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Englund v. Lewis*, at that point that an execution sale of the wife's property creates title to the premises, and such sale may be enjoined at 28 Id. 527, also citing the principal case.

KENDALL v. CLARK.

[10 CALIFORNIA, 17.]

COMPLAINT ALLEGING THAT PARTY AS SHERIFF, under a writ of execution against plaintiff, levied on and sold certain property which was the homestead of plaintiff, and claiming damages in two thousand dollars, facts sufficient to constitute a cause of action.

NO DAMAGE RESULTS FROM SALE OF HOMESTEAD property as the sheriff's deed in such case conveys no title and the purchaser acquires no right to the property sold.

ACTION on the official bond of defendant as sheriff, under an execution against plaintiff, property claimed to be a homestead. No answer or demurrer was filed. Judgment by default. Defendant appealed.

Heydenfeldt, for the appellant.

By Court, TERRY, C. J. The complaint does not state facts sufficient to constitute a cause of action.

The plaintiff sets out that Clark, who was sheriff, under an execution against plaintiff J. Kendall sold certain property which was the homestead of plaintiff and claims damages in two thousand dollars.

From the complaint itself it is clear that no damage can result from such sale. If the property was a homestead, the sheriff's deed conveyed nothing; if not, such sale could acquire no right to the property and plaintiff suffer no injury.

Judgment reversed.

FIELD and BURNETT, JJ., concurred.

HOMESTEAD IS EXEMPT FROM SALE UNDER EXECUTION: *Sampson v. Williamson*, 55 Am. Dec. 762, and note 771; *Hoyt v. Howe*, 62 Id. 705; *Charles v. Lamberson*, 63 Id. 457, note 463; levy and sale of homestead property is void, and passes no title to the purchaser: *Defells v. Pico*, 45 Cal. 292, citing the principal case.

PIEROY v. SABIN.

[10 CALIFORNIA, 22.]

UNDER SECTION 46 OF CALIFORNIA CODE there are but two classes of defense allowed, the first consists of a simple denial, the second of the allegation of new affirmative matter; and as the code has abolished all distinctions in the forms of action, and requires only a statement of the facts constituting the cause of action or defense, the two classes of defense must be the same in all cases.

CALIFORNIA CODE HAS ADOPTED the rule that defendant must either deny the facts as alleged or confess and avoid them, and if new matter in defense exists, it must be stated in the answer.

NEW MATTER IN DEFENSE IS THAT WHICH, under the rules of evidence, the defendant must affirmatively establish. Thus if the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter.

FACTS WHICH OCCUR SUBSEQUENT TO DATE OF ORIGINAL TRANSACTION constitute new matter; and as the California code has made no distinction between different classes of new matter, therefore all such matter of defense must be stated in the answer.

DEFENDANT MAY PROTECT HIMSELF AGAINST UNNECESSARY COSTS by putting in issue only the allegations in the complaint, or by conceding them to be true, and setting up new matter, thus narrowing the proofs upon the trial; but the plaintiff is protected against sham answers, which may be stricken out on motion. Such answer consists of one good in form, but false in fact, not pleaded in good faith, and which sets up new matter in defense which is false.

IN EJECTMENT, WHERE ANSWER CONTAINS SIMPLE DENIAL of the allegations in the complaint, defendants cannot introduce in evidence the copy of the record of a former recovery.

IN EJECTMENT, WHEN PLAINTIFF CLAIMS TITLE by virtue of older possession, defendant cannot prove a better title in another party through whom he does not claim.

IN EJECTMENT, PLAINTIFF MAY PROVE that while he and another were in possession each claimed the premises, such claim being part of the res gesta, and admissible to show that the party in possession assumed to hold in his own right, and not in subordination to another.

EJECTMENT. Defendants, in their answer, "denied, generally and specifically, each and every allegation, matter, and show-

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ing" contained in the complaint. On the part of plaintiff it was proved that one Crowell was, in 1853, the owner and in possession of, and resided on a parcel of land known as the Crowell Tract; that in 1853 he conveyed the east half of the said tract to Mary Piercy, wife of plaintiff; that the dividing line between the lands of plaintiff and those of Crowell was defined by stakes driven in the ground about three feet apart, the line running through the center of the said tract; that plaintiff was in possession of the land purchased, and maintained such possession until ejected by defendants, before the commencement of the present action; that while in possession plaintiff inclosed the land with a fence, and built thereon a house, in which his family resided; that in June, 1857, defendants came upon the land and tore down thereon a house, which plaintiff tore down. Upon the trial the defendants asked a nonsuit. This was denied, and the case was excepted. They then offered in evidence the copy of a former recovery in trespass in their favor and against the plaintiff. This was ruled out, and defendants excepted. The opinion contains the other facts.

Cook and Fenner, for the appellants.

H. S. Love, for the respondent.

By Court, BURNETT, J. This was an action to recover possession of land. The defendants simply denied the allegations of the complaint. The plaintiff had judgment for the land, and the defendants appealed.

The first error assigned by the learned counsel of the appellants is that the court erred in refusing to nonsuit the plaintiff. We think there was no reason to sustain the motion of the appellants to nonsuit the plaintiff. The evidence was sufficient to permit the case to go to the jury.

The second error assigned is, that the court erred in admitting the record of a former suit.

Under the old system of pleading, a former recovery could be given in evidence under the general issue, in assumpsit, trover, case, and ejectment. In ejectment the only plea was "not guilty:" *Miller v. Manice*, 6 Hill, 115; *Rummell*, 2 Id. 478; *Reynolds v. Stansberry*, 20 Ohio, Pl. 507. But the question arises whether our code has changed the former rule upon this subject. Under the code there are only two classes of defense allowed. The first consists of a simple denial; and the second of the affirmative matter. And as the code has abolished


tinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases.

The plaintiff is required to state in his complaint the facts that constitute his cause of action, and it seems to have been the intention of the code to adopt the true and just rule, that the defendant must either deny the facts as alleged, or confess and avoid them. It is certain that where new matter exists it must be stated in the answer. The answer "shall contain a statement of any new matter constituting a defense." The language of this section is very clear, that this new matter, whatever it may be, must be set up in the answer. The question then arises, What is "new matter" in the contemplation of the code itself? New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. A defense that concedes that the plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter: 1 Ch. Pl. 472; *Gilbert v. Cram*, 12 How. Pr. 455; *Radde v. Ruckgaber*, 3 Duer, 685; *Brazil v. Isham*, 12 N. Y. 17.

If facts which occur subsequent to the date of the original transaction do not constitute new matter, what facts do constitute it? And if any subsequent matter can properly be called "new matter," must not all subsequent matters be equally entitled to the same designation? The language of the code is explicit that the "answer shall contain a statement of any new matter constituting a defense." The code makes no distinction between different classes of new matter. All new matter of defense must be stated in the answer.

This feature of the code is one of the most beneficial and obvious improvements upon the former system. This classification of defenses is simple, logical, and just. Each party is distinctly apprised of all the allegations to be proved by the other; and each is therefore prepared to meet the proofs of his adversary. The plaintiff is compelled to set out every fact necessary to constitute his cause of action, and the defendant every new matter of defense. This is required by the true principles of pleading: 1 Ch. Pl. 526.

Two of the leading ends contemplated by the code are simplicity and economy: *Adams v. Hackett*, 7 Cal. 187. As contributing to the attainment of these ends, it was the intention of the code to require the pleadings to be so framed as not only to



apprise the parties of the facts to be proved by them, respectively, but to narrow the proofs upon the trial. This intention is clearly shown, not only by the spirit and general scope of the system, but by particular provisions. The different provisions of the act, when construed together and legitimately applied, lead to this conclusion.

If we take the theory to be true, that under our system the defendant by simply denying the allegations of the complaint may give in evidence all matters which could be formerly given in evidence under the general issue, it is difficult to perceive what purpose the code has accomplished by the provisions of section 46. The classification of defenses therein found would be substantially useless. In vain has that section provided that the answer shall contain a statement of any new matter constituting a defense, when nearly all such matter could be given in evidence under a simple denial in the answer. Under the former system, almost every matter in discharge of the action could be given in evidence under the general issue.

But this theory would seem to be liable to the most substantial objections, and to lead, in practice, to bad results.


The plaintiff states the facts that constitute his cause of action. He is not required to state conclusions of law. The liability of the defendant is the result or conclusion which the law draws from the facts alleged. If a complaint should only allege that the defendant was indebted to the plaintiff in a named sum, which the defendant refused to pay, the complaint would not state facts sufficient to constitute a cause of action. The complaint must allege the facts that constitute the indebtedness. When, therefore, the facts constituting the cause of action are stated, a simple denial of these facts can properly put in issue only the constituent facts, and not the mere conclusion from the facts. The plaintiff, therefore, comes prepared to prove the facts as alleged. But if the defendant, under his simple denial, is permitted to prove almost everything in discharge of the action, the plaintiff cannot know how to avoid surprise upon the trial, unless he comes prepared to meet every possible ground that may be taken by the defendant. The result is a great and unnecessary increase of costs in many cases. The plaintiff is not to blame, because he could not know what he had to meet. The defendant is not to blame, because he only wished to deny the allegations of the complaint, and not to introduce any new matter. But the rule would not allow him to do so, in a form that would apprise the plaintiff clearly

of all he intended, and no more. The rule made his answer wider than he intended. He simply denied the allegations of the complaint. He could do no less if he defended at all.

If it be said that under section 49 the defendant may plead as many defenses as he may have—and in this way may compel the plaintiff to come prepared to meet as many grounds as he would have had to resist under the general issue—we reply that the argument is not sound. Under the view we have taken, the defendant may protect himself against unnecessary costs by only putting in issue the allegations of the complaint, or by conceding them to be true and setting up new matter, thus narrowing the proofs upon the trial. So, under our view, the plaintiff is protected against sham defenses which may be stricken out on motion: Sec. 50. A sham answer is one good in form but false in fact, and not pleaded in good faith. It sets up new matter which is false: *Nichols v. Jones*, 6 How. Pr. 355; *Ostrom v. Bixby*, 9 Id. 57; *Fleury v. Rogers*, Id. 215; *Fleury v. Brown*, Id. 217; Voorhies's Code, p. 177, note b.

But if it be true that under a simple denial in the answer the defendant may give in evidence any defense formerly admissible under the general issue, the provisions of section 50, allowing sham answers to be stricken out, would possess but very little practicable utility. A simple denial could not be treated as a sham answer; and yet all the purposes of vexation could be as well accomplished by it as by separate defenses. So the provisions of sections 49, requiring defenses to be separately stated, would be almost useless. As most of these new matters could be given in evidence under the negative answers, they need not be stated at all.

Anciently, in England, the general issue was seldom pleaded, except when the defendant meant wholly to deny the allegations of the declaration. Matters in discharge of the action were specially pleaded. But by acts of parliament, special matter was allowed to be given in evidence, under the general issue, in certain cases, affecting public officers. The rule was gradually extended to other cases. It was the opinion of Sir William Blackstone that this relaxation of strictness anciently observed did not produce the confusion anticipated. This supposition prevailed for a long time, but subsequent experience led to a change of opinion. The result of this change was the adoption of the Reg. Gen. Hilary Term, 4 Wm. IV., "which puts an end to the misapplication and abuse of the general issue, and compels a defendant in terms to deny particular parts of a declaration.



and to plead specially every matter of defense, not merely consisting of denial of the allegations of the declaration:" 1 Ch. Pl. 473, 512.

These regulations restored the ancient rule, and placed the science of pleading upon its true principle. The framers of the New York code, from which ours is mainly taken, would seem to have intended to accomplish the same result. It has been there held, and seems now to be the well-settled rule, that new matter must be set forth in the answer. Payment, an award, or a former recovery must be pleaded: *Calkins v. Packer*, 21 Barb. 275; *Brazil v. Isham*, 12 N. Y. 17. Such defenses admit the contract as alleged, but avoid it by matter *ex post facto*.

The decisions of this court have not been uniform upon this question. The classification of defenses under section 45 of the practice act of 1850 was the same as that under section 46 of our present code. It was held by this court, in several cases, that all new matter must be set up in the answer: *Ladd v. Stevenson*, 1 Cal. 18; *Grogan v. Ruckle*, Id. 195; *Wallon v. Minturn*, Id. 368; *Kendall v. Vallejo*, Id. 372. But in the case of *Gavin v. Annan*, 2 Id. 494, it was held that a general denial has the same influence as the general issue at common law, and under it accord and satisfaction may be shown. To the same effect was the decision in the case of *McLarrin v. Spalding*, Id. 510.

In reference to mere matters of practice, involving no principle, it is safe to adhere to a rule long established: *Ellisen v. Halleck*, 6 Cal. 394. But we think the principle involved in this question one of too much practical importance to be conclusively settled by the decisions heretofore made. The first decisions made by this court, as we conceive, are sustained by the reason and philosophy of the science and by the weight of authority.

There was no error in refusing the copy of the record of the former recovery, as the answer of defendants contained a simple denial of the allegations of the complaint.

The third error assigned is, that the court refused to permit the defendants to prove that one Ludlum had located one hundred and sixty acres of land, including the premises in controversy, under the act of April 20, 1852, "prescribing the mode of maintaining and defending possessory actions on public lands in this state:" Wood's Digest, 526.

There was no error in this. The defendants did not claim under Ludlum, and the plaintiff did claim by virtue of his own possession, and also under Crowell, who had formerly been in

the actual possession of the premises. Whether plaintiff's or Crowell's possession was older or better than that of Ludlum was a question that defendants could not raise as between themselves and the plaintiff: *Bird v. Lisbros*, 9 Cal. 1; [*ante*, p. 617]; *Welch v. Sullivan*, 8 Id. 165.

There was no error in allowing the plaintiff to prove that while he and Crowell were in possession each claimed the premises. The fact of claiming the property was part of the *res gestæ*, and admissible to show that the party in possession assumed to hold in his own right, and not in subordination to another.

Judgment affirmed.

TERRY, C. J., and FIELD, J., concurred.

DEFENSE NOT SET UP IN ANSWER IS OF NO AVAIL: *Field v. Mayor of New York*, 57 Am. Dec. 435; *Lord v. Ocean Bank*, 59 Id. 728, and citations in notes to these cases; *Cummings v. Coleman*, 62 Id. 402.

RECORD IN EJECTMENT SUIT AS EVIDENCE: *Patton v. Kennedy*, 10 Am. Dec. 744.

IN EJECTMENT, DEFENDANT MAY SHOW TITLE OUT OF PLAINTIFFS, though he does not connect himself with it, if he did not enter under them: *Bloom v. Burdick*, 37 Am. Dec. 299, and note 309; and that he may rely on a superior title, see *Casey v. Inloes*, 39 Id. 658.

GENERAL DENIAL ONLY PUTS IN ISSUE the allegations in the complaint. New matter must be specially pleaded: *McKyring v. Bull*, 69 Am. Dec. 696, and note thereto; *Glazer v. Clyft*, 10 Cal. 304; *Moss v. Shear*, 30 Id. 472; *Perkins v. Barnes*, 3 Nev. 565; *A. & N. R. R. v. Washburn*, 5 Neb. 125; *Coles v. Soulsby*, 21 Cal. 50; and such new matter is that which would defeat the cause of action: *A. & N. R. R. Co. v. Washburn*, 5 Neb. 123, all citing the principal case. Where the defendant denies a contract as the plaintiff has stated it, it is not new matter: *Parks v. Hinds*, 14 Cal. 415, distinguishing the principal case. Sham answer is one good in form but false in fact, and not pleaded in good faith: *Greenbaum v. Turrill*, 57 Id. 287; *Beckman v. Manlove*, 18 Id. 388; *Foren v. Dealey*, 4 Or. 95, all citing the principal case.

IN ACTION OF EJECTMENT, BROUGHT SOLELY ON PRIOR POSSESSION of plaintiff, a defendant who is a mere trespasser cannot justify his act by showing the true title to be outstanding in a third person. This rule is said to have no application in *Dyson v. Bradshaw*, 23 Cal. 536.

ISAAC v. SWIFT.

[10 CALIFORNIA, 71.]

ISSUANCE AND LEVY OF EXECUTION BEFORE EXPIRATION OF JUDGMENT

LIEN will not have the effect of prolonging the lien beyond the two years limited by section 204 of the code of California. Both the levy and sale must be made within the time limited by the act.

CODE HAVING EXPRESSLY LIMITED EXISTENCE OF JUDGMENT LIEN to two years, a continuance beyond that time will not be presumed.

WHERE EXECUTION SALE IS NOT PREVENTED by some legal impediment, the judgment lien expires at the end of two years, under section 204 of the California code.

THE opinion states the facts.

George Cadwalader, for the appellant.

Crocker and Robinson, for the respondent.

By Court, BURNETT, J. This controversy has relation to a lot in Sacramento city, both parties claiming title under Arents and Chedic. Reynolds & Co. obtained judgment against Arents and Chedic on the eleventh of October, 1853, upon which execution was issued and levied on the fourth of October, 1855, and the property sold by the sheriff on the twentieth of October, 1855, to the vendor of plaintiff. On the eighth of June, 1854, the defendant, Swift, obtained judgment against Arents and Chedic, upon which execution was issued and levied in February, 1856, and the property sold to defendant by the sheriff in March, 1856.

It will be seen that the execution upon the judgment of Reynolds & Co. against Arents and Chedic was issued and levied seven days before the expiration of two years from the date of the judgment, and that the sale was made some nine days afterwards. The question is, whether the issue and levy of this execution, before the lien of the judgment expired, had the effect to prolong the lien beyond the time limited by section 204 of the code. That section provides "that from the time the judgment is docketed it shall become a lien upon all the real property of the judgment debtor, not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until said lien expires;" and that "the lien shall continue for two years unless the judgment be previously satisfied."

The New York statute of 1813, concerning judgments and executions, provided that "all judgments hereafter to be rendered shall cease to be a lien or incumbrance upon any real estate as against *bona fide* purchasers, or subsequent incumbrancers by mortgage, judgment, or otherwise, from and after ten years from the time the same shall be docketed:" 1 R. L. 500.

In the case of *Roe v. Swart*, 5 Cow. 294, the court said, "The words leave no room for doubtful construction." So in the case of *Little v. Harvey*, 9 Wend. 158, it was said by Sunderland, J., in delivering the opinion of the court, that "the language of the act is too clear to admit of any question as to its construction." It was accordingly held in both these cases that

the issue and levy of the execution before the expiration of the ten years would not extend the lien beyond the time mentioned in the statute, "unless the plaintiff has been restrained from issuing execution by injunction out of chancery." This is the settled doctrine in that state: *Tufts v. Tufts*, 18 Id. 621; *Dickinson v. Gilliland*, 1 Cow. 481.

By an act of the legislature of the state of Mississippi, approved February 24, 1844, it was provided that "no judgment heretofore rendered in this state shall be a lien on the property of the defendant or defendants for a longer time than two years from the passage of the act." Under this provision, it was held that the execution must issue and the sale be made within the two years; otherwise the lien of the judgment was lost. The issue and levy of an execution within the time limited would not prolong the lien of the judgment: *Rupert v. Dantzler*, 12 Smed. & M. 697. The decision in the case was expressly approved by the court in the subsequent case of *Beirne v. Mower*, 13 Id. 427.

The statute of 1799 provided that no execution should be levied or sale of lands made which might affect the title of a *bona fide* purchaser, unless the execution was levied and the sale made within twelve months from the rendition of the judgment. It was accordingly held that the sale must be made within the time limited by the act; *Dickenson's Lessee v. Collins*, 1 Swan, 516.

By the statute of Texas, passed the fifth of February, 1840, Acts 4th Cong. 95, a final judgment was made a lien on all the property of the defendant, situated and being in the same county where judgment was rendered, "provided that said lien shall cease to operate, if execution be not issued out within twelve months from the date thereof."

Under this act, it was held, in the case of *Shapard v. Bailleut*, 3 Tex. 26, that the lien of the judgment ceased if execution was not issued within the year, unless the issuing of the execution was prevented by some legal impediment. In the case of *Trapnall v. Richardson*, 13 Ark. 543 [58 Am. Dec. 338], it was held by the supreme court of Arkansas that a levy upon land, within three years of the date of the judgment, would not continue the judgment lien beyond that period.

In considering these authorities, it must be conceded that the terms of the several statutes mentioned are stronger than the language of section 204 of the code. The language of the former is substantially that the lien shall not continue, or shall

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ISAAC v. SWI

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How. 287, is not in point. The question whether the issue and levy of an execution could prolong the lien of the judgment beyond the period stated did not arise in that case. There is nothing in the opinion of the court that conflicts with the view we have taken. The judgment was a lien upon the property of Crane, the judgment debtor. Execution was issued and levied upon the land; but the sale could not be made for the want of legal bids, and the papers were returned to the clerk's office. Crane having died within about one year, a writ of *venditioni exponas* was issued, commanding the sheriff to sell the land, and under this writ the sale was made. It was objected that this writ could not be issued until after the revival of the judgment upon *scire facias* against the heirs. The court held that the property was in the custody of the law; that the lien of the execution was not lost, and the sale under the *venditioni exponas* was valid, this writ being regarded as merely "a continuation and completion of the previous execution."

The cases of *Pennock v. Hart*, 8 Serg. & R. 369, *Commonwealth v. McKisson*, 13 Id. 144, and *Bell v. Ingram*, 2 Pa. St. 490, are certainly in point for the plaintiff. But the weight of reason and authority would seem to be against the doctrine of those cases. The injurious consequences flowing from these decisions induced the legislature of Pennsylvania to pass the act of the twenty-sixth of March, 1827, under which it has since been held that the issuing of a *fi. fa.* within the period mentioned in the statute will not extend the lien of the judgment beyond such period: *Davis v. Ehrman*, 20 Id. 256. The remarks of Woodward, J., in the last case, and of Chief Justice Watson in the case of *Trapnall v. Richardson*, 8 Ark. 556, are very forcible, and clearly point out the evils of the rule contended for by plaintiff's counsel in this case.

The case of *Bank of Missouri v. Wells*, 12 Mo. 361 [51 Am. Dec. 163], was different in its circumstances; and the decision is not precisely in point. The sale, within the time limited, was prevented by a statute changing the time of holding the terms of the circuit courts, at which all sales of real estate were required to be made.

As the question does not arise in this case, we express no opinion as to whether, in case the sale be prevented by injunction, or other legal impediment, the lien of the judgment must expire at the end of the two years. There was no impediment preventing the sale in this case, the order of the court, made

pending the proceedings in insolvency, not having such effect: *Rix v. McHenry*, 7 Cal. 89.

Judgment affirmed.

TERRY, C. J., and FIELD, J., concurred.

EXECUTION SUE OUT AND DELIVERED TO SHERIFF effects a continuance of the judgment lien until the execution of the writ, although the time had elapsed during which the lien of the judgment continued: *Bank of Missouri v. Wells*, 51 Am. Dec. 163; but see note thereto 166, citing and discussing the principal case, and showing that the contrary rule is followed in the major portion of the states.

JUDGMENT LIEN CANNOT BE EXTENDED IN EQUITY: *Buchan v. Sumner*, 47 Am. Dec. 305, note 320.

TO PRESERVE PRIORITY ACQUIRED BY JUDGMENT LIEN, the sale must be made during the statutory period of the lien: *Bagley v. Ward*, 37 Cal. 133. Such lien being the creature of the statute, it is not contingent upon the issuing of an execution and levy; nor is it an incident or consequence of the judgment; and its validity depends upon a docket entry in conformity with the statute: *Id.* 141; *In re Boyd*, 4 Saw. 264. When the judgment has been suspended, the lien, being a mere incident, shares a like fate: *England v. Lewis*, 25 Cal. 351; and where the judgment lien is created by express words of a statute, express words will be required to continue it beyond the time specified: *Myers v. Mott*, 29 *Id.* 372, all citing the principal case to the above points.

HAYNES v. MEEKS.

[10 CALIFORNIA, 110.]

UNDER CALIFORNIA STATUTE, EXECUTOR OR ADMINISTRATOR CANNOT RESIGN his appointment until he has settled his accounts and delivered the estate to such person as may be appointed by the court. Under this statute, the permission given in the one case is a negative upon the right of resignation in all others. *Per MURRAY, C. J.*

PROBATE JUDGE IS NOT VESTED WITH PLENARY POWERS, but acts within an inferior and limited jurisdiction. *Per MURRAY, C. J.*

ACCEPTANCE BY PROBATE COURT OF RESIGNATION of administrator before he has settled his accounts with the estate is illegal and void. *Per MURRAY, C. J.*

ORDER OF PROBATE COURT RECITING FILING OF RESIGNATION of an administrator, and directing him to turn over the effects of the estate to the public administrator, and that he settle with such administrator by the first day of the next term, that when such settlement should be made, then the administrator and his sureties should be released from further liability, when taken in connection with the appointment subsequently of an administrator *de bonis non*, is sufficient proof of the acceptance by the probate court of the resignation of the administrator first appointed. *Per BURNETT, J.*

NO GREAT STRICTNESS SHOULD BE REQUIRED as to the manner of stating facts in the records of courts of limited and special jurisdiction. *Per* BURNETT, J.

FACTS OF DEATH OF INTESTATE AND OF HIS RESIDENCE WITHIN COUNTY must exist before the probate court can make a binding order in reference to the subject-matter or the person; but when proved to exist, every subsequent movement of such court is the exercise of jurisdiction over both the subject-matter and all persons who have been brought properly before it. *Per* BURNETT, J.

RIGHT OF PROBATE COURT TO ACCEPT RESIGNATION OF ADMINISTRATOR under proper circumstances is clear; and where his resignation is accepted before the settlement of his account with the estate, this is only the erroneous exercise of jurisdiction, and cannot be attacked collaterally. *Per* BURNETT, J.

QUESTION NOT DECIDED AS TO WHETHER WANT OF SUFFICIENT NOTICE BY ADMINISTRATOR of an application to sell real estate can be set up as defense in an action of ejectment. It would seem, however, that the equities of all parties could be better settled in a direct proceeding to set aside the sale.

WHETHER SALE OF REAL ESTATE BY ADMINISTRATOR WITHOUT SUFFICIENT NOTICE would be void or merely voidable may be matter of grave doubt, such sale being a proceeding *in rem*.

EJECTMENT. George Harlan was a resident of and died in Santa Clara county, seised of the land in dispute. One Smith was, in the month of August, 1850, duly appointed his administrator by the probate court of said county. In November, 1853, Smith was cited to show cause why he should not be attached for failing to file his final account of settlement of the estate. In December, 1853, he filed his resignation as administrator with the court, whereupon the court, on the same day, made an order, given in the fourth subdivision of syllabus, *supra*. Between January and May, 1854, the probate court made numerous orders concerning the final account of Smith as administrator, from which it is shown that there was a large balance in his hands unaccounted for. In May, 1855, one Aspinwall petitioned the court to be appointed administrator of the estate, stating himself to be a creditor, and alleging the insolvency of Smith and his sureties. In June, 1855, Aspinwall was appointed administrator *de bonis non*. Haynes became the purchaser of the land in dispute at a sale made by virtue of an order of court, and Weeks claims title and has possession of the land under conveyances from Harlan's heirs. Judgment for defendant in the lower court, and plaintiff appeals.

Crockett and Page, and Shattuck, Spencer, and Reichert, for the appellant.

A. P. Crittenden, for the respondent.



By Court, MURRAY, C. J. The only question involved in this case is, whether an administrator can resign by permission of the probate court without having previously settled up his accounts.

Section 100 of the act regulating the settlement of the estates of deceased persons provides "that an executor or administrator may, at any time, by writing filed in the probate court, resign his appointment, provided he shall first settle his accounts and deliver up all the estate to such persons as may be appointed by the court." This is all the authority to be found in our statute upon the subject.

The question is somewhat novel, and the counsel have been able to find but one decision which has any bearing on the subject. The case of *Flinn v. Chase*, 4 Denio, 85, seems to be precisely in point. The court held that a surrogate has no right to permit or authorize an administrator to resign, except in the cases provided by law. On examination of the New York statutes, I have been unable to find the cases referred to by the court in which it is said a resignation will be permitted, and the force of the decision is somewhat weakened by the evident misapprehension or mistake of the statute by the court.

It is insisted that section 100 of our statute confers upon an administrator an absolute right of resignation in a certain case, as contradistinguished from a partial or qualified right which he may exercise by permission of the judge.

The fair inference to be drawn from the statute, following the ordinary rules of construction, is that the permission given in the one case is a negative upon the right in all others. The probate judge or surrogate is charged by law with the execution of special duties; he is not vested with plenary powers, but acts within an inferior and limited jurisdiction. There is nothing in the statute conferring upon him the power to accept the resignation of an administrator, except in a single case, and it is not unreasonable to suppose that the legislature intended to cast upon those who voluntarily took upon themselves the administration of an estate the burden of settling the same, except in the single case mentioned.

The appellant contends that inasmuch as the law authorizes an administrator to be removed for certain specific causes, the judge should be allowed to accept his resignation, where it appears that these causes of removal exist, and that the court should not be compelled to go through the form of a removal where the party is willing to resign. Where a citation to show

cause why he should not be removed for some misfeasance or malfeasance had issued, and the officer confessed the charge by attempting to resign, the court would not necessarily be required to go through with all the proof, but might enter an order of removal. Be that as it may, this case presents no such state of facts. There never was an attempt to remove the administrator, and the acceptance of his resignation under the circumstances was illegal and void.

Judgment affirmed.

TERRY, C. J., concurred.

By Court, BURNETT, J. (on reargument). The first question presented by the record is, whether the resignation of Smith was accepted by the probate court. There is no order stating expressly that the resignation was accepted.

In 1 Williams on Executors, 643, it is said: "Some authorities maintain that if the ordinary commit administration to the wrong party, and then commit it to the right, the second grant is a repeal of the first, without any sentence of revocation; but in other cases it has been held that the first is not avoided except by judicial sentence; . . . and in all cases where the first administration is repealed, the second stands good, though granted after the first, and before the repeal of it."

In the case of *Bowerbank v. Morris*, 1 Wall. C. C. 118, it was held by the circuit court of the United States for the third circuit that "a removal from office may be either express, that is, by a notification of the president of the United States that an officer is removed; or implied, by the appointment of another person to the same office." So in the case of *McLaurin v. Thompson*, Dudley (Ga.), 336, it was decided by the court of Georgia that the second grant of administration is equivalent to a judgment of revocation.

We think there can be no doubt as to the fact that the resignation of Smith was accepted by the probate court. The subsequent appointment of Aspinwall was evidence of this, taken in connection with the order made on the thirty-first of December, 1853. Although these are courts of limited and special jurisdiction, still no great strictness should be required as to the manner of stating facts in their records. So the facts are stated, it is sufficient, although not stated in the most direct and certain form.

The second question is, whether the court had the right to accept the resignation of Smith before he had settled his accounts.

In reference to this point, we adhere to our former opinion. We see no reason for changing the views we then expressed.

But the third question, and the main point in the case, is whether this error of the court was void or merely voidable.

In the case of *Beckett v. Selover*, 7 Cal. 215 [68 Am. Dec. 237], we held that there were two jurisdictional facts that must exist, to support administration, in every case: 1. The death of the party; 2. His residence within the county at the time of his death. "These two facts must be alleged in the petition, and they must be true in point of fact."

The decision of an inferior court, upon the question of its own jurisdiction, cannot be conclusive upon any one not before it, and then only in reference to jurisdiction of the person, which may always be waived. But when the court has once acquired jurisdiction, "every movement of the court is necessarily the exercise of jurisdiction." If the jurisdiction acquired be of the subject-matter, then all the subsequent proceedings in reference to the subject-matter must be nothing but the exercise of jurisdiction over that subject-matter; so if the court once acquire jurisdiction of the person, any other movement affecting the person must be the exercise of jurisdiction as to that person; and when jurisdiction is once acquired of both the subject-matter and the person, then any subsequent movement of the court must be the exercise of jurisdiction as to both.

In this case the probate court had jurisdiction of the subject-matter and of the person. Administration had been regularly and properly granted to Smith, and he was under the control of the court, which had power to receive his resignation, suspend his powers, or revoke his letters: Secs. 281, 286. The court having jurisdiction to receive the resignation of Smith, the acceptance of his resignation must be nothing more than the exercise of this jurisdiction. Had the court possessed no power over Smith at all, and, consequently, no right to receive his resignation under any circumstances, then the act of the court would have been void. But the court, having jurisdiction of the subject-matter of the estate and of the person of Smith, must judge whether the circumstances of his case were such as to entitle him to the privilege of resignation; and if the court erred in this judgment, it was a mere error committed in the exercise of jurisdiction.

The fact of the death of the intestate and of his residence within the county are foundation facts upon which all the subsequent proceedings of the court must rest. Unless these facts

exist, the court cannot make a single binding order in reference to the subject-matter or the person. But when those facts exist, every subsequent movement of the court is the exercise of jurisdiction over the subject-matter, and over all persons who have been brought properly before it. When parties interested, as, for example, the heirs in reference to a sale of real estate, have not been brought before the court, they may, in proper cases and by the proper proceedings, set aside such action of the court.

But in this case Smith was properly before the court, and the right of the court to receive his resignation under proper circumstances was clear; and the acceptance of his resignation was only the erroneous exercise of jurisdiction. The court has power to remove an administrator for certain specified causes. Should the court remove him without sufficient cause, and he take no appeal, could third parties object to this action of the court in a collateral proceeding? So if the court suspend an administrator without sufficient cause, and appoint a special administrator during the period of his suspension, could this action of the court be called in question collaterally? Or would the act of the special administrator be void? We apprehend not.

The case of *Griffith v. Frazier*, 8 Cranch, 8, was where an executor had qualified, but afterwards removed from the state, and letters of administration were granted by the ordinary to another person. This grant was held void, because "the appointment of an executor vests the whole personal estate in the person so appointed; he holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator; he is, for the purpose of administering them, as much the legal proprietor of those chattels as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing; it conveys no right; it is a void act:" Marshall, C. J.

We have also been referred by the learned counsel of defendant to the case of *Flinn v. Chase*, 4 Denio, 85.

It must be conceded that this decision is an authority in point. But it does not seem to have been well considered, or rightly decided. The surrogate had improperly appointed Lowry instead of Dugan, the brother of the deceased; and had afterwards accepted of Lowry's resignation without sufficient reason. The court held the appointment of Lowry a mere irregularity, but the acceptance of his resignation a nullity. Now, it was clear

that the surrogate had jurisdiction to grant letters, and also to accept the resignation of the administrator; and why his appointment without cause should be merely irregular, and the acceptance of his resignation void, it is difficult to perceive. The surrogate had equal jurisdiction in both cases, and his act in both would seem to have been only an erroneous exercise of jurisdiction.

We think the decision of the court below as to the sufficiency of the notice of the application to sell the real estate was correct, and that the sale was not void for want of notice.

It is unnecessary to decide the question as to whether the want of sufficient notice of an application to sell real estate can be set up as a defense in an action to recover the possession of the property. We may remark, however, as a matter of opinion, that a direct proceeding to set aside the sale would be preferable. Under our probate system, "the true theory is, that both the real and personal estate of the intestate vest in the heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, and with the right in the administrator of present possession:" *Beckett v. Selover*, 7 Cal. 215 [68 Am. Dec. 237].

If the sale be void or voidable, the lien of the administrator continues; and it would seem equitable that the purchaser, who has paid the debts of the estate, should have a lien upon the estate for his purchase money. All the equities of all parties could be better settled in a direct proceeding: *Regland v. Green*, 14 Smed. & M. 195. Besides, it may be matter of grave doubt whether a sale of real estate without sufficient notice would be void or merely voidable. The sale being a proceeding *in rem*, there may not be any sufficient reason for holding the sale void by reason of a defective notice: 4 Phill. Ev. 62, note 42.

For the reasons stated, the judgment of the district court is reversed, and that court will render judgment for plaintiff upon facts found.

TERRY, C. J., concurred.

PROBATE COURT IS COURT OF SPECIAL AND LIMITED JURISDICTION: *Clark v. Perry*, 63 Am. Dec. 82; *Grimes's Estate v. Norris*, 65 Id. 545; *Morrow v. Weed*, 66 Id. 122, and notes to these cases; *contra: Alexander's Heirs v. Maverick*, 67 Id. 693.

JURISDICTION OF PROBATE COURT TO GRANT LETTERS of administration cannot be collaterally attacked: *Abbott v. Coburn*, 67 Am. Dec. 735; *Riser v. Sneddy*, 65 Id. 740, note 744; *Driggs v. Abbott*, Id. 214.

FAILURE OF EXECUTOR TO GIVE NOTICE OF SALE prescribed by statute does not render the sale void: *Bland v. Muncester*, 57 Am. Dec. 162, note 163; *contra: Mitchell v. Bowen*, 65 Id. 758, note 760.

THE PRINCIPAL CASE IS CITED in *Townsend v. Gordon*, 19 Cal. 205, to the point that previous to the passage of the act of 1858 probate courts are to be regarded as courts of limited and special jurisdiction. It is cited in *Halleck v. Moss*, 17 Id. 344, to the point that executor's sale upon insufficient notice is at least voidable, if not void. It is referred to generally in *Meeks v. Fassault*, 3 Saw. 211.

THE PRINCIPAL CASE WAS AGAIN before the court, and will be found reported in 20 Cal. 288. It was then said, referring to it, that as to the question that the acceptance of the resignation of an administrator by the probate court before he had settled his accounts, was merely a voidable irregularity, one which might be corrected by appeal or direct proceedings for its correction, but could not be impeached collaterally. The court were concluded by the principal case, but were by no means satisfied with the conclusion which had been arrived at in this respect. They then devote some space to the criticism of this point. This latter case has been cited as follows: in *Halleck v. Moss*, 22 Id. 276, it is cited to the point that an order for the sale of real property of an intestate, made by the probate court after notice as prescribed by statute to all parties interested, and after examination of proofs submitted, is an adjudication that the sale of the property described is necessary, and unless appealed from, is conclusive upon the administrator and all parties interested in the estate. In *Pryor v. Downey*, 50 Id. 398, it is cited to the point that the jurisdiction of the probate court to order the sale of real property must appear, and depends on the averments in the petition, and not on the truth of those averments. The necessity for the sale is not a matter for the executor or administrator to determine, but is a conclusion to be drawn by the court from the facts stated, the petition furnishing the material for the judgment. It is cited in *Townsend v. Tallant*, 33 Id. 54, to the point that where the probate court has no jurisdiction to order a sale, it has none to confirm it, at least without the aid of legislation. It is cited in *Estate of Hamilton*, 34 Id. 468, where the court say that the appointment of a new administrator can no more be made whilst a former administrator is in office than an appointment can be made in the first instance until the death of the intestate. It is distinguished in *Meeks v. Hahn*, 20 Id. 623, which was a case arising on nearly the same state of facts, but different in this, that in the former the plaintiff claimed under a sale and conveyance from the administrator; the defendants under a conveyance from the heirs; that in the latter plaintiff claims through the heirs, while defendants claim through and under a sale ordered by the probate court. It is also said, in distinguishing the two cases, that the court held in the cited case that the probate court had no jurisdiction to order a sale, and that such sale was void, where the petition therefor was fatally defective for non-compliance with the statute. *Meeks v. Fassault*, 3 Saw. 211, is a case upon the same state of facts as that of the principal one, as reported in 20 Cal. 288, which is referred to generally as settling the question involved.

FREMONT v. CRIPPEN.

[10 CALIFORNIA, 212.]

ACTION OF FORCIBLE ENTRY AND DETAINER against three persons; verdict of guilty as to two, and not guilty as to the third: *Held*, that the verdict is conclusive that plaintiff was peaceably in actual possession of the premises at the time of the entry; and that such possession being incompatible with the lawful possession of another, the verdict is conclusive against the possession of the third person.

UNDER WRIT OF RESTITUTION IN ACTION OF FORCIBLE ENTRY AND DETAINER, the sheriff is authorized to dispossess parties who, though strangers to the proceedings, have entered into possession after the commencement of the action.

SHERIFF MAY BE COMPELLED BY MANDAMUS to execute a writ of restitution in an action of forcible entry and detainer.

TO SUPERSEDE REMEDY BY MANDAMUS, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application.

REMEDY BY MANDAMUS IS NEITHER SUPERSEDED by remedy by criminal prosecution nor action on the case for neglect of duty, as neither of the latter can compel a specific act to be done, and are therefore not equally convenient, beneficial, and effectual.

APPLICATION for a writ of mandate against defendant, as sheriff. Plaintiff brought an action of forcible entry and detainer against Clark, Vandewater, and the Merced Mining Co. for an intrusion upon a certain part of a mine known as the "Josephine Vein," in the county of Mariposa. After the jury had returned a verdict of guilty as to the first two parties defendant, and not guilty as to the said mining company, judgment was rendered awarding possession to Fremont, and a writ of restitution issued. This process Crippen, as sheriff, refused to execute, because the mine was in possession of certain parties claiming to hold under said mining company, and was not in possession of the parties found guilty in said action. Crippen refused to execute the writ for the further reason that since the rendition of judgment the tunnel in said mine had been deepened, and that under the writ he could only put Fremont in possession of that part of the mine excavated at the time of the entry of the judgment. The lower court ordered a peremptory *mandamus* to issue against Crippen, and from this order he appeals.

Richard H. Daly, for the appellant.

Perley, for the respondent.

By Court, **TERRY, C. J.** The refusal of the sheriff to execute the writ seems to be based on the hypothesis that the verdict of

Company were in the lawful possession of the premises at the time of the trial.

The verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry, that unlawful and forcible entry on his possession was made by defendants Clark and Vandewater, and that the Merced Mining Company did not participate in the trespass. The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another, and the verdict is conclusive against the possession of the Merced Mining Company.

The question then arises, whether, under the writ, the sheriff is authorized to dispossess parties who are strangers to the proceeding.

The object of the statute concerning forcible entries is to afford parties whose possession is disturbed by force and violence a summary remedy.

This object would be entirely defeated if a defendant, after judgment, could, by transferring the possession to a stranger, prevent the execution of the writ.

"If it were once permitted for a defendant, against whom there was a judgment on a forcible entry and detainer, to put in a third person, or for a third person to enter afterwards, with a view of again putting a plaintiff's title to the rack, such third person might again, in his turn, after judgment against him, put another in possession, or permit him to enter; so that there might be prosecutions without end, and the object of regaining possession by the plaintiff would be as far off as at the commencement of his first remedy to regain his possession, to the utter subversion of all justice:" *State v. Gilbert*, 2 Bay, 355.

The second reason assigned for the refusal is frivolous, and requires no notice at our hands.

There being no error in the record, the judgment is affirmed.

BURNETT and FIELD, JJ., concurred.

TERRY, C. J., on petition for rehearing. An application is made for a rehearing in this cause—one of the grounds being that the defendant had no opportunity to be heard before the decision of the court was rendered.

In the record there is a stipulation, signed by the attorneys of record for both parties, agreeing that "the cause be submitted for decision to the supreme court on written argument within ten days from the date, and that if either party fails to file said argument within said time, that the court may proceed to decide

the case immediately on the record and brief of either party that may be then on file."

This stipulation was dated September 15, 1858, was filed in this court on the nineteenth, and the decision of the court was rendered ten days afterwards.

The nature of the case, it being a proceeding against a public officer to compel the performance of an official duty, the anxiety of the parties to obtain a speedy decision, and the fact that it was represented to the court that the public peace would be endangered by delay, were, by the court, deemed sufficient reasons for taking up the record out of its order on the calendar.

If the appellant has not been fully heard, the fault lies with himself, as he had fourteen days between the date of the stipulation and the decision of the case in which to file a brief or to apply for an extension of time.

The conclusion of the court was arrived at after proper deliberation, was unanimous, and the argument of the counsel, in his application for a rehearing, has failed to raise a doubt as to its correctness.

The only point made in the petition which was decided in the opinion is, that the plaintiff's remedy was by action on the sheriff's bond, and not by *mandamus*.

This objection is not well taken; the statute provides that a *mandamus* may issue "to any inferior tribunal, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station," and shall issue in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.

Now the execution of final process is specially enjoined by law on defendant as a duty resulting from his office of sheriff; and in our opinion, the plaintiff in this case has no plain, speedy, or adequate remedy in ordinary course of law. It is true, he might sue defendant on his bond for the damages resulting from the non-performance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process, and is the only adequate remedy.

To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application.

Neither a remedy by criminal prosecution, *Rex v. Severn & Wye Railway Co.*, 2 Barn. & Ald. 646, nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is, therefore, not

equally convenient, beneficial, and effectual: *McOulough v. Mayor of Brooklyn*, 23 Wand. 461.

Rehearing denied.

FIELD, J., concurred.

MANDAMUS IS APPROPRIATE REMEDY to compel public functionaries or tribunals to perform some duty required by law, where the party has no other remedy: *Board of Police etc. v. Grant*, 47 Am. Dec. 102; *Arberry v. Beavers*, 55 Id. 791, and note 806.

MANDAMUS IS PREROGATIVE WRIT, and does not issue as mere matter of right; but where the party has a clear legal right under the laws of the state, with no other remedy to enforce it, the court will not refuse the writ: *Moody v. Fleming*, 48 Am. Dec. 210, and note 216, citing prior cases; *Arberry v. Beavers*, 55 Id. 791, note 806.

RULE THAT MANDAMUS WILL NOT BE GRANTED where there is a specific legal remedy is restricted to cases where the legal remedy is equally convenient, complete, and beneficial: *State v. North Eastern R. R. Co.*, 67 Am. Dec. 551, and note 553.

ALL PARTIES WHO ENTER UPON LAND PENDING ACTION OF EJECTMENT are subject to removal under the final process therein: *Sampson v. Ohlmer*, 22 Cal. 207, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Richardson v. Scott River W. & M. Co.*, 28 Cal. 150, to the point that defendant cannot, after judgment in an action of forcible entry and detainer, by transferring the possession to a stranger, prevent the execution of a writ of restitution. It is cited in *People v. Loucks*, 28 Id. 71, to the point that a clerk of a court may be compelled by mandamus to issue a writ of *habere facias possessionem*, as a suit upon his official bond for damages for the non-performance of his duty would be wholly inadequate; and this rule was held to apply to public officers generally in *Chambers v. Potts*, 2 Mont. 282, citing the principal case.

TO SUPERSEDE REMEDY BY MANDAMUS, a party must not only have a remedy specific and adequate, but one competent to afford relief upon the very subject-matter of his application, and it must be equally convenient, beneficial, and effective: *Babcock v. Goodrich*, 47 Cal. 508; *California P. R. Co. v. Central P. R. Co.*, Id. 531; *Price v. Riverside L. & I. Co.*, 56 Id. 424; *State v. Wright*, 10 Nev. 175, all citing the principal case.

FOGARTY v. FINLAY.

[10 CALIFORNIA, 239.]

CONDITION IN NOTARY'S BOND that he will "well and truly perform and discharge the duties of a notary according to law" embraces every act which he is authorized or required by law to do in virtue of his office.

CERTIFICATE OF NOTARY IS PRIMA FACIE EVIDENCE of the facts therein set forth, under the California statute.

NOTARY OMITTING TO STATE IN HIS CERTIFICATE that the party acknowledging was known to him, or identified, is guilty of gross and culpable negligence; and is liable on his official bond to the party injured for all damages resulting from such negligence.

CERTIFICATE OF NOTARY WHICH FAILS TO STATE that the party acknowledging was known to him, or was identified, is worthless either for the purpose of admitting the instrument in evidence without further proof or to entitle it to be recorded.

NEGLECT OF NOTARY TO CERTIFY THAT PARTY ACKNOWLEDGING is known to him, or was identified, is not excused by the fact that the certificate was partially filled by the attorney for the grantee.

NOTARY WHO AFFIXES HIS OFFICIAL SIGNATURE and seal to a certificate of acknowledgment without examining it, to find whether the facts certified are true, is guilty of negligence, and liable on his official bond for damages arising therefrom.

NOTARY, BY ACCEPTING OFFICE, HOLDS HIMSELF OUT to the world as a person competent to perform the duties connected therewith. He contracts with those who may employ him that he will perform them with integrity, diligence, and skill. Therefore a party cannot be charged with knowledge of a defect in a notary's certificate from having received the conveyance from the notary and retained it for some time in his possession.

MEASURE OF DAMAGES IN ACTION AGAINST NOTARY for his omission to state in his certificate of acknowledgment of a mortgage that the party acknowledging was known to him, or was identified, is the amount of the debt and interest intended to be secured by the mortgage.

THE opinion states the facts.

Hoge and Wilson, for the appellant.

S. Asbury Sheppard and Cyril V. Grey, for the respondents.

By Court, **TERRY, C. J.** Plaintiff loaned to one Dupuy a sum of money, taking as security a mortgage on a lot in San Francisco. The mortgage was acknowledged by Dupuy, before defendant Finlay, who was a notary public for San Francisco county.

The mortgage used was an ordinary printed form, having a certificate of acknowledgment in blank, in which was inserted, in the handwriting of one Sanders, who acted in the transaction as attorney for both mortgagor and mortgagee, the name of the mortgagor and the date of the acknowledgment. To this certificate the notary affixed his signature and seal, omitting to state either that the party acknowledging was known to him, or was identified by the testimony of a witness examined for that purpose.

In consequence of this omission, the record of mortgage was held not to impart notice to subsequent incumbrancers: See *Wolf v. Fogarty*, 6 Cal. 224 [65 Am. Dec. 509]. Plaintiff's lien was postponed in favor of a later mortgage, which exhausted the entire property, and Dupuy being insolvent, the debt was lost. Plaintiff now seeks

to recover on the bond of the notary the damage occasioned by the negligent and unskillful performance of an official act.

The condition of the bond executed by the defendants is, that Joseph W. Finlay should "well and truly perform and discharge the duties of a notary public according to law." This embraces every act which he is authorized or required by law to do in virtue of his office. By the "act concerning notaries public," each notary has power to take and certify the acknowledgment or proof of conveyances, and his certificate is made *prima facie* evidence of the facts therein set forth. "For any misconduct or neglect of duty in any of the cases in which any notary public, appointed under the authority of this state, is authorized to act, etc., he shall be liable on his official bond to the parties injured thereby for all damages sustained:" Compiled Laws, 903.

It is clear that in this case defendant Finlay did not faithfully perform his duty, but was guilty of gross and culpable negligence, and he is responsible to the party injured for the damages resulting from this negligence.

The purpose of a certificate of acknowledgment is to entitle the deed to be recorded, and to be admitted in evidence without further proof: Act concerning conveyances, secs. 18, 29. The certificate furnished was utterly worthless for either purpose. This neglect is not excused by the fact that the certificate had been partially filled by the attorney for the grantee. The certificate upon its face is unfinished; the date and the name of the grantor had been inserted, leaving it for the notary to insert his knowledge or the evidence received of the identity of the party making the acknowledgment.

If the notary read the certificate before signing it, this omission must have been known to him; if he did not, he is equally guilty of negligence, for an officer who affixes his official signature and seal to a document (thereby giving to it the character of evidence) without examining it, to find whether the facts certified are true, can scarcely be said to faithfully perform his duty according to law.

It is said that the plaintiff, having received the conveyance from the notary, and retained the same some time in his possession, is charged with knowledge of the defect in the certificate, and, as the damage was the result of his own negligence in failing to correct the error of the notary when in his power, he is only entitled to recover the cost of the certificate.

This position we think erroneous. Finlay held himself out to the world as a person competent to perform the business

connected with the office. By accepting the office, he contracted with those who might employ him that he would perform it with integrity, diligence, and skill: 3 Bla. Com. 165. He had given a bond to indemnify those who should suffer by the unfaithful or unskillful performance of his duty.

It is not shown that plaintiff was aware of the omission in the certificate; but admitting he knew it, he was not obliged to determine upon the validity or legality of the act of the officer. The statute gave him a remedy upon the bond of the officer for the damages sustained by the malperformance of his duty, and he had the right to rely on this remedy.

Our conclusion from the record is, that the plaintiff is entitled to recover of defendants the damages caused by the act of the notary, and that the measure of damages is the amount of the debt and interest intended to be secured by the mortgage.

Judgment reversed, and cause remanded, with directions that the court below render a judgment in accordance with this opinion.

FIELD, J., concurred.

IDENTITY OF PARTY MUST APPEAR IN NOTARY'S CERTIFICATE of acknowledgment, otherwise it is void: Note to *Livingston v. Kettelle*, 41 Am. Dec. 175, citing, among others, the principal case; *Wolf v. Fogarty*, 65 Id. 509, note 511.

NOTARY CANNOT DELEGATE HIS OFFICIAL AUTHORITY: *Sheldon v. Benham*, 40 Am. Dec. 271.

LIABILITY OF PUBLIC OFFICER FOR NEGLIGENCE: See *Baily v. Mayor of N. Y.*, 38 Am. Dec. 669; *Adsit v. Brady*, 40 Id. 305; *Wilson v. Mayor of N. Y.*, 43 Id. 719; *Stewart v. Southard*, 49 Id. 463; *Laflin v. Willard*, 28 Id. 629.

CONANT v. CONANT.

[10 CALIFORNIA, 249.]

SUPREME COURT POSSESSES APPELLATE JURISDICTION IN DIVORCE proceedings, though they do not involve questions of property.

SECTION 4 OF ARTICLE 6 OF CALIFORNIA CONSTITUTION construed to give the state supreme court appellate jurisdiction in all cases; provided that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed two hundred dollars in value or amount, unless the legality of a tax, toll, impost, or municipal fine is drawn into question.

ALLEGATIONS IN COMPLAINT CHARGING ADULTERY ought to state with reasonable certainty the time and place of its commission; but defendant, by failing to demur, waives his objection so far as want of specification of acts constituting the charge is concerned.

WHERE NO CAUSE IS ASSIGNED FOR EXPLANATION OFFERED FOR DESERTION of the husband by the wife, who is suing for divorce, it is legally inferred that she is guilty of willful desertion.

CALIFORNIA STATUTE HAS SPECIFIED CERTAIN ACTS or offenses which shall constitute grounds of divorce. These are equally pleadable in bar, the one to the other, within the principle of the doctrine of recrimination.

TO BAR ACTION OF DIVORCE ON GROUND OF DESERTION by plaintiff, it must exist for two years, under the California statute, and the court cannot fix a period other than that designated; still, such desertion for less time than the statutory period furnishes a proper subject for consideration in determining the character of divorce to be granted.

TO OBTAIN DIVORCE A VINULO MATRIMONII, the applicant must be an innocent party without reproach, and however guilty the defendant, if the applicant is chargeable either with similar guilt or an offense to which the law attaches similar consequences, the relief must be denied; and if the applicant, though not thus guilty, is still not blameless, relief must be limited to a divorce *a mensa et thoro*.

THE opinion states the facts.

S. Heydenfeldt, for the appellant.

J. W. Winans (by consent), for the respondent.

By Court, FIELD, J. The plaintiff charges in her complaint, as grounds of divorce, the habitual intemperance of the defendant; his neglect to provide for her the common necessities of life for the period of three years next preceding the commencement of this suit, having the ability to provide the same; extreme cruelty on his part; and adultery committed while she was living with him, "at the city of San Francisco, at divers times, with persons to the plaintiff unknown;" and adultery committed since she ceased to live with him, "at the said city of San Francisco, with divers other persons, whose names are to the plaintiff unknown." No attempt was made to substantiate any of these charges, except that of adultery in one instance, committed after the plaintiff had ceased to live with her husband; and objection was taken to any evidence on this head, under the pleadings. It appeared in proof that the plaintiff had deserted the residence of her husband more than a year previous to the act of adultery; and this fact, and the defective allegation in the pleadings, constituted the principal grounds upon which the defendant relied to defeat the plaintiff's application. A decree dissolving the marriage was rendered, and the defendant appealed.

A preliminary objection is taken to the hearing of the appeal that this court possesses no appellate jurisdiction, in a case of divorce, when a question of property is not involved in its de-

termination. The fourth section of article 6 of the constitution provides that "the supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll, or impost, or municipal fine is in question; and in all criminal cases amounting to felony, on questions of law alone." We do not understand the last words of the first clause of this section as restricting the jurisdiction only to those cases which involve questions of property, or the legality of a tax, toll, impost, or municipal fine. As we read the section, the court possesses appellate jurisdiction in all cases; provided that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost, or municipal fine is drawn in question. Similar language as to the amount is used in defining the original jurisdiction of the district courts. The sixth section of the same article declares that "the district courts shall have original jurisdiction, in law and equity, in all civil cases, when the amount in dispute exceeds two hundred dollars, exclusive of interest."

It could never have been the intention of the framers of the constitution to deny to the higher courts, both original and appellate, any jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation; such as suits to prevent threatened injury, respecting the guardianship of children, honorary offices to which no salary is attached, and the like. And yet to this result the position of the respondent directly leads. We think the construction contended for too narrow, and not imperatively required by the language of the constitution.

The allegations of the complaint, as to the adultery, are vague and uncertain; and the complaint might have been demurred to successfully on this ground. The charge should have been stated with reasonable certainty as to time and place, so as to have enabled the defendant to prepare to meet it on the trial.

In *Heyde v. Heyde*, 4 Sandf. 693, the charge in the complaint was that "the defendant, since the marriage, viz., in the month of November, 1851, committed adultery with a female in the city of New York, whose name is unknown to the plaintiff, and the particular circumstances whereof are unknown to the plaintiff, but which she expects to be able to prove at the trial of this cause."

"The judge said it would be dangerous to proceed on such an

indefinite allegation. If the party have information sufficient to warrant the belief that the offense has been committed, or the expectation that it can be proved on the trial, that information must extend at least to the particular place or locality where it occurred, though the name of the person with whom may be unknown:" *Codd v. Codd*, 2 Johns. Ch. 224; *Wood v. Wood*, 2 Paige, 113; *Bird v. Bird*, Wright, 98; *Richards v. Richards*, Id. 302; *Stokes v. Stokes*, 1 Mo. 322; *Wright v. Wright*, 3 Tex. 168.

The defendant, by failing to demur, waived the objection, so far as the want of specification of the acts constituting the charge is concerned. The statute has not altered any of the ordinary rules of pleading for cases of divorce, except that nothing can be taken by admission or default. The object of this exception is to prevent collusion between the parties; and when this is accomplished, the ordinary rules apply.

It appears in proof that the plaintiff left the residence of her husband more than a year previous to the act of adultery on the part of the defendant, and has ever since lived apart from him. No cause is assigned or explanation attempted for her conduct; and the legal inference follows that she was guilty of nothing less than willful desertion; and this is urged as a bar to the application of the plaintiff, not on the ground that it justified the adultery of the defendant, but that it deprived her of all right to a cancellation of the marriage contract, whose obligations she had herself disregarded.

It is a general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to obtain success, must himself have performed the obligations on his part. Something analogous to this principle is found in the doctrine of recrimination, or *compensatio criminum*, which was originally borrowed from the canon law, by which the defendant is permitted to contest the plaintiff's application on the ground of his own violation of the marriage contract—to set off, to use the language of the cases, the equal guilt of the plaintiff. "The doctrine," observes Lord Stowell, "that this, if proved, is a valid plea in bar, has its foundation in reason and propriety; it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to the charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollu-

lated his marriage vow should be barred of his remedy, the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt:" *Beeby v. Beeby*, 1 Hagg. Ecc. 790.

In England, until a recent period, divorces from the bonds of matrimony were never granted but by act of parliament. Divorces from bed and board were decreed by the ecclesiastical courts, and then only for adultery or cruelty, and it is the settled doctrine of those courts that proof of adultery of the plaintiff will bar a suit on the ground of the adultery of the defendant, but that cruelty furnishes no bar to such suit: *Proctor v. Proctor*, 2 Hagg. Cons. 292; *Dillon v. Dillon*, 8 Curt. Ecc. 86.

The ground upon which the distinction between recrimination by reason of the adultery and recrimination by reason of the cruelty of the plaintiff is placed is, that the offenses are not of the same kind. Thus in *Chambers v. Chambers*, 1 Hagg. Cons. 439, where the defendant pleaded in bar to the suit, among other grounds, the cruelty of the plaintiff, Lord Stowell said: "It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery if you are guilty of the same offense yourself.' The received doctrine of compensation would have that effect, because both parties are in *eodem delicto*; but this is not so in recrimination of cruelty. The *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know that she would be barred by a recrimination of that species, for the consideration would be very different. The court might not oblige her to cohabitation, which

in the ecclesiastical courts, which possessed only authority to decree a divorce *a mensa et thoro*, it was the settled course of parliament, in determining on the propriety of granting a petition of divorce *a vinculo matrimonii*, to allow both adultery and cruelty to be pleaded in recrimination as an absolute bar; and in the *Matter of Simmons's Divorce Bill*, 12 Cl. & Fin. 339, where the husband had separated from his wife for many years without making any provision for her maintenance from his means, which were sufficient, it was held by the house of lords that he was not entitled to a divorce, though the adultery of the wife was clearly proved. Lord Brougham, in moving the postponement of the bill, observed, "that he wished it to be clearly understood that he did so, not on the ground of the husband's adultery, but wholly independent of that charge, and as if there was no ground whatsoever for it; on the evidence that this person neglected his wife, and threw her on the world without caring what became of her, or how she was supported, or allowing her anything towards her support;" and Lord Campbell, in expressing a concurrence in the views taken by Lord Brougham, said "that he thought this person's conduct in neglecting his wife, while he was carrying on a large business, and paying servants large wages, did disentitle him to the relief he asked of their lordships."

In this state the statute has specified certain acts or conduct which shall constitute grounds of divorce, and so far as the matrimonial contract is concerned, the courts cannot distinguish between them, whatever difference there may be in a moral point of view. The several offenses must, therefore, be held equally pleadable in bar to the suit for divorce—the one to the other, within the principle of the doctrine of recrimination.

Aside from this consideration, it would seem to be correct in principle that where the matter pleaded is such as would entitle the defendant to a decree, had it been presented in a bill brought by himself, the relief should be denied. Certain consequences are attached to the decree, independent of the dissolution of the marriage contract, and they are generally more favorable to the party obtaining the relief than to the contestant; but a decree cannot be granted in favor of one, and afterwards in favor of the other, as the first would dissolve the marriage, and then no marriage would subsist upon which the second decree could act; and a decree granting a divorce in favor of each would be an anomalous proceeding: Bishop on Mar. & Div. 401; *Dejarnet v. Dejarnet*, 5 Dana, 499.

In Missouri the statute authorizes a divorce from the bonds

of matrimony, like the statute of this state, on several grounds; and in *Nagel v. Nagel*, 12 Mo. 53, it was held that when both parties were found guilty of any of the enumerated offenses for which a divorce may be granted, the bill should be dismissed. In that case the evidence sustained the charge of adultery on the part of the defendant, and the charge of cruel and inhuman treatment on the part of the plaintiff: *Ryan v. Ryan*, 9 Id. 539.

The cases in which the doctrine of recrimination has been generally applied have been those in which the adultery of the plaintiff was established: *Mattox v. Mattox*, 2 Ohio, 234 [15 Am. Dec. 547]; but as our statute attaches to other offenses the same consequences as to adultery, there is reason and propriety in extending to them the same principle. It is eminently fit that he who seeks a divorce should himself be guiltless of conduct which would entitle the other party to similar relief.

The only difficulty in the position of the appellant arises from the period to which the desertion of the plaintiff extended. Had it existed for two years, the time provided by statute to constitute a ground of divorce, we should have no doubt that the bill should have been dismissed. But to be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her had suit been instituted by the defendant. This is not the present case, and we cannot fix a period other than that designated by the statute.

The desertion of the plaintiff was without excuse, and her conduct is by no means relieved by the imputations of cruelty, neglect, and habitual intemperance cast upon the defendant in her complaint, none of which has she attempted to establish, and which we must therefore presume to have been wantonly made. Still, it is not sufficient, under the statute, to bar a decree, the adultery of the defendant being established, but it furnishes a proper subject for consideration by the court in determining the character of the divorce to which she is entitled. The statute says divorces may be granted from bed and board, or from the bonds of matrimony, but it was never intended that either should be indifferently granted, according as the prayer of the applicant asked for one or the other modes of relief. It was intended that a certain discretion should be exercised by the courts, according to the special circumstances of each suit, acting upon the settled principles of the common law as applicable to this class of cases. And the true rule which should govern the courts in the exercise of its discretion in this respect is this, that to entitle to a decree for an absolute divorce from the bonds

of matrimony, the applicant must be an innocent party—one who has faithfully discharged the obligations of the marriage relation, and seeks relief because really aggrieved or injured by the misconduct of the other; and on the other hand, where there are circumstances showing a disregard of those obligations, though not carried to such a degree as to constitute itself a ground for divorce, the decree should be only for a divorce from bed and board. To obtain a release *a vinculo matrimonii*, the applicant must be without reproach, and however guilty the defendant, if the applicant is chargeable either with similar guilt or an offense to which the law attaches similar consequences, the relief must be denied; and if the applicant, though not thus guilty, is still not blameless, the relief must be limited to a divorce *a mensa et thoro*.

It follows, from the views we have taken, that the decree of the district court dissolving the marriage between the parties must be reversed, and the court directed to enter a decree granting a divorce to the parties only from bed and board.

Ordered accordingly.

BALDWIN, J., concurred.

PETITION FOR DIVORCE ON GROUND OF ADULTERY ought to state the time and place of its commission: *Christianberry v. Christianberry*, 25 Am. Dec. 96, and note 99.

DESERTION ON PART OF PLAINTIFF is no defense to an action of divorce on the ground of adultery: *Richardson v. Richardson*, 30 Am. Dec. 538; and desertion to constitute ground for divorce must have continued up to the time of filing the libel: *Clark v. Clark*, 34 Id. 165.

COMPLAINANT WHO IS GUILTY OF SAME CRIME of which he complains will be denied a divorce: *Mattox v. Mattox*, 15 Am. Dec. 547; *Smith v. Smith*, 27 Id. 75, and note 80.

UNDER SECTION 4, ARTICLE 6, of the California constitution, the supreme court possesses appellate jurisdiction in all cases, provided that when the subject of litigation is capable of pecuniary compensation the matter in dispute must exceed two hundred dollars, unless the legality of a tax, impost, or municipal fine is drawn into question: *Dumphy v. Guindon*, 13 Cal. 30; *Perry v. Ames*, 28 Id. 386; *People v. Rosborough*, 29 Id. 418; *Courtwright v. Bear River & A. W. & M. Co.*, 30 Id. 579; *Knowles v. Yeates*, 31 Id. 84, 86, 89; this rule was held not to apply under the amended constitution, in *Appeal of Houghton*, 42 Id. 64, 65, Temple, J., concurring; but see the dissenting opinion of Rhodes, C. J., 68, 69, where he adopts and affirms the reasoning of the principal case as being applicable under the amended constitution. All of the cases *supra* cite the principal case.

DESERTION FOR LESS PERIOD THAN TWO YEARS is not sufficient to bar a decree for divorce, where the adultery of defendant is established, but it may be a ground for limiting the divorce to one from bed and board: *Wilson v. Wilson*, 40 Iowa, 232, citing the principal case.

GREEN v. COVILLAUD.

[10 CALIFORNIA, 217.]

RULE THAT PLEADING IS TAKEN MOST STRONGLY against the party making it is drawn from the legal supposition that every suitor will state his case as strongly as the facts warrant.

WORDS "GOOD AND SUFFICIENT DEED" in a covenant import only a conveyance good in form, and sufficient to pass the title actually held by the covenantor, and not that he would convey a good title.

PARTY TO CONCURRENT OBLIGATION SEEKING ENFORCEMENT of the stipulations of the other must first show a compliance with his own.

COURT OF EQUITY WILL NOT ENFORCE SPECIFIC PERFORMANCE of a contract to convey lands, when the plaintiff shows no compliance or offer to comply on his part with the agreement, nor any excuse therefor, for the period of twenty-one or twenty-two months from the time he bound himself to perform.

TIME IS NOT ORDINARILY OF ESSENCE OF CONTRACT TO CONVEY land, yet in every case it devolves upon the party seeking specific performance to account for his delay, and if there are circumstances showing culpable negligence on his part, or if the time permitted to intervene, together with other circumstances, raise the presumption of an abandonment of the contract, or if the property has greatly enhanced in value, and the purchaser has laid by apparently for the purpose of taking advantage of this circumstance, he is not entitled to specific performance of his contract.

QUESTION AS TO WHETHER AND WHEN TIME IS OF ESSENCE OF CONTRACT to convey land discussed at length, and numerous authorities referred to, and the doctrine enunciated which the court deems applicable in California.

ALLEGATA AND PROBATA MUST AGREE, and averments material to the case omitted from the pleading cannot be supplied by evidence. This is a cardinal rule in equity as well as in all other pleading, and is peculiarly necessary upon a bill for specific performance.

BILL for specific performance, filed by plaintiffs Green and Elrod against Covillaud and numerous other defendants. It appears from the bill that plaintiffs and M. J. Turney and Ezra Bligh purchased in January, 1851, of two of the defendants, a tract of land containing about two hundred and twenty-six acres. The consideration of said purchase was seven hundred dollars, one hundred of which was paid. A note, to become due on October 1, 1851, was given for the balance. The vendors executed a bond, promising that they would, "upon the payment of the promissory note at its maturity," execute "a good and sufficient deed of conveyance," and deliver it to the vendees or their representatives. The vendees, at the time of the execution of the note and bond, went into possession of all of said land, except a few acres claimed by one of the defend-

ants as a settler under the government. This defendant shortly afterwards entered upon and took possession of one half of the tract purchased by the vendees. At the time of his entry he knew that the land was claimed by the vendees. Plaintiffs remained in possession of the remainder of said land, claiming it as their own, until the time of the filing of this bill, at which time they were the sole possessors. Plaintiffs further alleged that at the time that their note became due there was a cloud upon the title to the land, preventing the vendors from executing "a good and sufficient deed" thereof; that soon after the confirmation of the title, in March, 1855, said vendees made a tender of the amount due on their note, with interest; that the vendors refused the tender, and also to execute the deed. Plaintiffs also averred that the note had never been presented to them, or either of them, for payment, and in an amended complaint filed by them they alleged a prior tender and refusal of the purchase money in the summer of 1853. Other facts are stated in the opinion. In the lower court plaintiffs were decreed specific performance on the part of defendants, and costs. Defendants appealed.

Beardan, Mitchell, and Smith, for the appellants.

Charles Lindley and O. H. Bryan, for the respondents.

By Court, BALDWIN, J. The law supposes that every suitor will state his case as strongly as the facts warrant; and hence the rule that a pleading is taken most strongly against the party making it. The plaintiffs' bill in this case, moreover, was sworn to. It is evident that the bill was framed upon the supposition that no duty of paying the note devolved upon the payors until the payees obtained a confirmation of title to the premises; and that the fact that the title was in litigation or uncertainty was a sufficient excuse for non-payment until that litigation was terminated, and that uncertainty removed. Although the bill does not say so in so many words, yet, by the rules of construction adopted in such cases, this averment is equivalent to the declaration that the payees had no claim on the payors for payment until they could make the latter a good title; that in consequence of this litigation, doubt and uncertainty existed as to this fact of title; that the vendees therefore "could not safely pay;" that hence they were excused from payment or tender; that, accordingly, they were not bound and did not offer to pay until after the confirmation of title; and that the offer soon thereafter made was a compliance of the contract, in substance.

on their part. In all this they were, it seems to us, clearly mistaken. The case of *Brown v. Covillaud*, 6 Cal. 568, which is a case very similar to this in its main features, disposes of the whole matter of this bill as it originally stood; and, for reasons which appear in the sequel, we feel no inclination to disturb that decision. It is true that the learned judge of the tenth district, in a vigorous opinion delivered in this case, and incorporated into the respondents' argument, expresses the opinion that the weight of authority does not sustain the ruling of this court in *Brown v. Covillaud*, *supra*, which held that the words "good and sufficient deed," in a covenant, import only a conveyance good in form, and sufficient to pass the title actually held by the covenantor, and not that he would convey a good title. But we think the natural meaning of this language, as well as the number and weight of the authorities, are as this court has decided in that case. The cases in New York and Massachusetts seem to be well considered, and are explicit on that point: *Van Eps v. Corporation of Schenectady*, 12 Johns. 436 [7 Am. Dec. 330]; *Parker v. Parmele*, 20 Id. 130 [11 Am. Dec. 253]; *Tinney v. Ashley*, 15 Pick. 552; while the Kentucky cases cited in the argument of the counsel for respondent in *Brown v. Covillaud*, *supra*, do not apply; for in those cases the covenant was to make title, not a deed. If in this we were mistaken, we should not be disposed to overturn a solemn decision of this court, sustained by such high and imposing authority. Nor, if we were so inclined, is it at all clear that it would avail the vendees; for it is not shown that they did not know the true state of the title, which was easily understood; and which, though subjected to the ordeal of examination by commissioners appointed under a public law, passed before the maturity of the note, it seems, has turned out to be all the vendors represented.


It appears to us that it would be pushing the doctrine contended for—even conceding it to have any claims to recognition—to extremes to hold that every Mexican grantee who sold land and took a note for the purchase money, payable when a title was made, was bound by the contract to wait until it was ascertained what action the board of land commissioners, or the United States district court, or the supreme court of the United States, on appeal, would take upon the claim; for it is not shown by this bill that this claim was in any wise defective, or in any degree inferior, in law or equity, to any other land claim presented to the board. It will not be seriously contended that the passage by congress of the act for the ascertain-

ment and settlement of land claims of itself embarrassed or clouded any man's title; and yet the bill does not aver any other cause of embarrassment. Nor can anything be made of the charge that the vendors represented the title at the time of the sale to be good; for, as we have shown, it is not alleged in what, nor that the title was not good.

This being the true state of the case, if we construe this agreement as a concurrent obligation, which is the most favorable view to be taken of it for the respondents, the party seeking the legal enforcement of the stipulations of the other must first show a compliance with his own: *Platt v. Brown*, 15 Pick. 553. The vendees were only entitled to the deed on "payment (or tender of payment) of the note." The whole matter, down to the filing of the amendment of the bill, is foreclosed by the decision in *Brown v. Covillaud*, *supra*, which seems almost a counterpart of this bill. The original bill being disposed of, the question left is, Does the amendment alter the principle of decision in that case? We will not stay to remark upon the apparent inconsistency of the two bills, nor to comment—for that is mere matter of proof—upon the suspicious nature of the amendment, under the circumstances. The question on the pleadings is confined to the legal insufficiency of the plaintiffs' own case as they have stated it.

The amendment professes to give a new excuse for plaintiffs' laches in not paying, or offering to pay, the note; the first reason, as has been seen, is, that they were not bound to pay it at all until the confirmation of title—that "they could not safely do it." The second explanation is, that though they were not bound to pay it, and could not safely do it until confirmation, yet they did, notwithstanding, offer to pay some time in the summer of 1853. The note was due in October, 1851. The pleading being taken most strongly against them, we must then fix the time as late as possible, consistently with the statement; we fix it the last of August, 1853. Nearly two years, then, elapsed after the note became due without any legal excuse of any sort for a failure to pay, upon a contract purporting to bind the payors to an absolute engagement of payment at a given time. We say no excuse is offered, for that made in the original bill has been passed upon in the case of *Brown v. Covillaud*, 6 Cal. 568, and found entirely nugatory. This question of law, then, arises on the face of the pleadings: Will a court of equity enforce a specific performance of an agreement to convey lands when the plaintiff shows no compliance or offer of compliance on his part with

the agreement, nor any excuse therefor, for the period of twenty-one or twenty-two months from the time he bound himself to perform? And this question, too, is decided, in effect, by *Brown v. Covillaud*, *supra*, from which opinion the negative of the proposition results as a logical necessity. The court—the late chief justice delivering the opinion—quote the judgment of Judge Story in *Taylor v. Longworth*, 14 Pet. 172: “And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate periods, been a material change in circumstances affecting the rights, interests, or obligations of the parties—in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be unequitable and unjust. But, except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of contracts, and relief will be given to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases, the court expects the party to make out a case free from all doubt, and to show that the relief he asks is, under all the circumstances, equitable, and to account in a reasonable manner for his delay and apparent omission of duty.” This court proceeds: “From the foregoing, which is but a concise statement of the principle, it may be gathered that, while time is not of the essence of the contract ordinarily, yet in every case it will devolve upon the party seeking the relief to account for his delay; and if there are circumstances showing culpable negligence on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raise the presumption of an abandonment of the contract, or if the property has greatly enhanced in value in the mean time, and the purchaser has laid by apparently for the purpose of taking advantage of this circumstance, he will not be entitled to a decree in his favor.” It will thus be seen that, so far from giving countenance to the idea that a party may wait for years, or even months, without fulfilling any part of his agreements, and then, when he thinks it his interest to intervene, come in and claim, as an arbitrary right, a literal enforcement of the contract which he has broken, it is laid down by the court that, in every case of delay, a reasonable excuse for that delay must be given. In



this case, as we have shown, this court has decided there was no excuse at all.

We might rest this portion of the case here, but that the learned judge below, while not professing an unwillingness to follow the decision of this court in *Brown v. Covillaud*, 6 Cal. 558, yet has in pointed—we will not say in too pointed—terms expressed his dissatisfaction with that case; and we understand, besides, that many other cases exist in which the same general doctrine announced in that case applies. We propose, therefore, as briefly as possible, to give our views of the law of specific performance, as applied to the records here, independently of the case before cited of *Brown v. Covillaud, supra*.

By the common law, a party to a contract was compelled to show a literal performance of the stipulations of it before he could claim damages for a non-performance against the other. But in many instances this was found to be a harsh rule. The ground of equitable relief is thus stated by the chancellor, in *Alley v. Deschamps*, 13 Ves. 228: "This relief was first given upon a legal right, instead of damages; which was followed by another class of cases equally clear, that where a party was not able to perform his engagement to the letter, if the failure was not substantial, the other should not be permitted to take advantage of the strict letter." This was a strong case. The chancellor admitted that possession, on the faith of the agreement, had been taken; that one hundred pounds was paid in part satisfaction of the contract; but nothing further having been done until the premises became more valuable, the chancellor asked, in the language of Lord Rosslyn, where was the equity of placing him in the same situation as if he had availed himself of the contract? The chancellor said the court ought not to interfere unless it is clear that the party will have that for which he contracted. It would be very dangerous to permit parties to lie by with a view to see whether contract will prove a gaining or a losing bargain, and, according to the event, to abandon it, or, considering the lapse of time as nothing, to claim a specific performance, which is always a matter of discretion.

After chancery assumed jurisdiction of the question, it gradually extended the cases upon which it acted, and carried the doctrine to comparatively great lengths; but seeing the evils to which this extension gave rise, afterwards returned to a nearer approach to the ancient rule. The common expression, that "time is not of the essence of the contract," probably never was understood by the judges in the lax sense often imputed to

those terms. The doctrine, even as carried, has been regretted by many eminent judges as encroaching upon the statute of frauds—since a contract executed to do a thing at a given time is not a contract to do it in a reasonable time—and as encouraging a looseness of obligations in contracts: See the observations of Lord Cranworth, V. C., in *Parkin v. Thorold*, 2 Sim., N. S., 57, 58; *Anthony v. Leftwich*, 3 Rand. 246, opinion of Judge Carr, quoting Lord Redesdale's remarks in *Harnett v. Fielding*, 2 Sch. & Lef. 549. The leaning of the modern cases, especially in this country, is to tighten instead of to relax the rule. Mr. Parsons, in his admirable work on contracts, vol. 2, p. 541, makes these observations:

“A somewhat different question arises, or if it be the same it has a different aspect, when the parties have themselves agreed upon a time at which the title must be good, and shown to be so, and have made this time a part of the contract. If that time has elapsed, there can be no specific performance of the contract; and if the plaintiff asks for a further time, he may be said to ask that the court should make a new bargain, and not to seek the enforcement of the bargain he had made for himself. There may be given, in answer to this, the rule in equity that ‘time is not of the essence of a contract;’ but we think it would be wiser and safer to express what is really meant by this rule, by saying that time is not necessarily of the essence of a contract. It certainly may be made so by the parties themselves, or by the circumstances of the case, although the parties say nothing about it. Thus, if a delay is asked by either party, and the court give it, they never give an unlimited period, but name a day of reasonable distance, and refuse to go further. This rule is invoked in a great variety of cases, and is applied in many of them. And language is sometimes used in respect to it—possibly a use is sometimes made of it which is not easily reconciled with the just duties and powers of equity. We cannot doubt that the rule must needs be substantially this: The court will always inquire into the time when a thing is to be done, as they will into any other part of the contract. If the thing to be done—whether a conveyance of land or anything else—can be as well done at a later time as an earlier, or the reverse, and certainly without detriment to the party called upon to do the thing, then time is not, in fact, of the essence of the contract, and will be regarded by the court, or rather disregarded, accordingly, provided the parties have not themselves expressly agreed that the time shall be treated as essential, or made it so by their conduct. But if it seems that the whole value, or a material part of the

value, of the transaction to the defendant depends upon its being done at a certain time, and no other, or that the substitution of any other will subject him in any way to loss or material inconvenience, then time is certainly of the essence of the contract, so far as he is concerned, and the court will so regard it. And in deciding the question whether time be of the essence of the contract or not, a court of equity could hardly fail to consider that the express agreement of the parties themselves upon a certain time is strong, though not conclusive, evidence that it belonged to the essence of the contract. We said that time was not necessarily of the essence of the contract. But at this period and in this country it usually is so in fact. Very few transactions in business are isolated and independent. It is not often that one buys without making arrangements elsewhere for the purpose, or sells without having other things in view and connected with this by distinct bargain, or at least by a definite plan and expectation. In other words, it must be true here, in point of fact, that it is generally almost as material when a contract is carried into full effect as how it is. It may not have been so formerly; but we think that both the moral and judicial equity applicable to existing usages will, for the most part, find time to be entitled to especial regard."

The good sense of these observations is conspicuous. The late English cases, especially *Gee v. Pearse*, 2 De G. & S. 325, tend the same way. The vice-chancellor, Sir Knight Bruce, observing in that case that a purchaser not ready with the price ought to show a very special case for the interference of this court against the vendor. In *Southcomb v. Bishop of Exeter*, 6 Hare, 213, it is said the tendency of the court, in numerous cases, has been to restrict the exercise of its jurisdiction to those cases in which the plaintiff has been prompt in seeking his equitable remedy.

Nor is it necessary that time be made essential by express contract, but will be held so when, from the circumstances, it must have been the intention of the parties: *Coslake v. Till*, 1 Russ. 376; *Doloret v. Rothschild*, 1 Sim. & St. 590. So Chancellor Kent, in *Benedict v. Lynch*, 1 Johns. Ch. 373 [7 Am. Dec. 484], after reviewing learnedly the authorities, stated the general principle to be that time was a circumstance of decisive importance, but it might be waived by the conduct of the parties. It was incumbent upon the party seeking specific performance to show that he had used due diligence; or, if not, that his negligence arose from some just cause, or had been acquiesced in;

that it was not necessary for the party resisting the performance to show any particular injury or inconvenience. It was sufficient if he had not acquiesced in the negligence of the other party. In *Walker v. Jeffreys*, 1 Hare, 348, 23 Eng. Ch., the vice-chancellor said: "In contracts relating to land, the time is not in general considered in equity as of the essence of the contract, and it was once considered that it could not be made so even by express stipulation. But after it had been decided that time might be made essential, the tendency of the decisions, especially of those of Sir John Leech, has been to hold persons concerned in contracts relating to land bound, as in other contracts, to regard time as material. And this principle has been applied with the greater strictness where the property is connected with trade." Here the chancellor cites a number of cases. The chancellor adds: "These cases appear to me so sound in principle, that I certainly will not be the first to shake them." In several of these cases there was possession. *Anthony v. Leftwich*, 3 Rand. 246, is a strong case, in which relief was denied after possession and part performance.

In *Rogers v. Saunders*, 16 Me. 101 [33 Am. Dec. 635], is a learned and well-reasoned opinion, by Mr. Justice Shepley, covering all the points in this case, and reviewing the authorities. The delay in that case was from July, 1832, to December, 1834; the plaintiff had bound himself to take up some bonds of the defendant, but failed to do so. On tender afterwards, the defendants refusing, the plaintiff brought bill for specific performance, and the bill was dismissed. The court, speaking of the rise in property, say: "According to the rules applicable to sales of estates in England, there could not, in this case, be a decree for a specific performance, and there is less reason for it in this country, and especially in a case relating to lands covered with a growth of timber, and having no fixed or certain value, but rising and falling in price according to the market for lumber, and greatly affected in value by other causes. In this particular they more nearly resemble stocks; and time is of the essence of the contract in such cases, and no relief can be given." The remark of Livingston, J., in *Hepburn v. Auld*, 5 Cranch, 279, applies with great force to this case. Speaking on this subject, he says: "But there is a vast difference between contracts for land in that country and this. There the lands have a known, fixed, and stable value. Here the price is constantly fluctuating and uncertain. A single day often makes a great difference; and in almost every case time is a very material

circumstance." The court further say: "Where its binding efficacy has been lost at law by lapse of time, courts of equity are in the habit of relieving when time is not essential to the substance of the contract. Time is of the essence where the thing sold is of greater or less value according to the effluxion of time, and the sale of a reversion and of stock are put as examples of the rule. So when a house is known to have been purchased for a residence at a particular time, and when the parties have by their contract expressly so agreed, time is essential. And in these cases no relief is given against the lapse of time. It is not of the essence of the contract where the object is security for the payment of money; and in the ordinary case of the sale of an estate, the general object being the sale for an agreed sum, the time of payment is regarded as formal, and that stipulation as meaning that the purchase shall be compelled within a reasonable time, regard being had to all the circumstances: *Hipwell v. Knight*, 1 You. & Coll. 415. Time is not, however, in such cases, to be altogether disregarded; but to entitle him to relief, where time is not essential, the party asking it must show that circumstances of a reasonable nature have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived. Where he has been guilty of laches, and offers no satisfactory reason for it, and the other party has not waived or acquiesced in it, no relief can be granted." In the case of *Rogers v. Saunders*, 16 Me. 101 [33 Am. Dec. 635], the court say that after the application of the vendee to the vendor to execute the contract, that was a circumstance which ought to have induced him to proceed punctually to perform his part of the contract.

In *Lloyd v. Callett*, 4 Bro. C. C. 469, as reported in 4 Ves. 689, note *b*, the chancellor says: "I want a case to prove that where nothing has been done by the parties this court will hold, in a contract of buying and selling, a rule that certainly is not the rule at law, that the time is not an essential part of the contract. Here, no step has been taken from the day of sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? It is true, the plaintiff must have considered himself bound after the day; so he was: he could not take any advantage of his own neglect." In *Guest v. Homfray*, 5 Ves. 818, the master of the rolls says: "The only question is, whether the plaintiff has done enough to show he took all the pains he could to be ready to carry into execution the agreement." The

done. It rests entirely upon that point.

Nor will equity give relief against a lapse of time, where there has been a very material change in the value of the property, making a great change in the condition of the parties. In such cases, the utmost watchfulness is expected of the party not to let the contract fall. In *Paine v. Meller*, 6 Ves. 349, the vendor did not perform in time, but the purchaser consented to complete the contract upon certain terms; and before the deeds were executed the houses were burned. It was held that the vendor could be relieved only by proving an actual acceptance of the terms by the purchaser before the loss. In *Brashier v. Gratz*, 6 Wheat. 589, it is said: "Another circumstance which ought to have great weight is the change in the nature of the land." Had the land fallen in value, he could not have paid the purchase money. "Where the price agreed for in the original

“desirous” of paying the money on it? or that one who did not think he was bound to pay at all until after confirmation was “eager” to pay before?

That time is not in some instances of contract of the essence of it may be very true; but the idea that in California in 1851, 1852, or even later, either the period of the conveyance of land or of the payment of the price was immaterial, or not an important element of the contract, seems to us plainly opposed to common sense. Unless we hold that the vendor considered a “slow note” as good as gold, and a chance to get the money in many months (or, as it resulted in this instance, five years) as good as a certainty of it in hand, or that ten per cent per annum, if he wished it to stand on interest, as good as three or four per cent per month, compounded, we do not see how this notion can be maintained; but it seems, from plaintiffs’ own bill, that they did not even consider themselves bound to pay this except in the contingency of a confirmation of the title. We are not making a new principle, but only applying the ancient rule to new circumstances. Circumstances may show, say the books, the intention to consider time essential, and then, if so shown, time is held material; and what circumstances could better show that the intention of the vendors was to get the money at maturity than the condition of California affairs, social, political, and financial in 1851, 1852, 1853, and several years succeeding? Would any rational man, making a trade like this, and taking a note, consider it an essential alteration if asked to extend the time to eighteen months, with legal instead of usual rates of interest? Would a bargain decreed by the court for the money to be paid in that time be substantially the bargain he thought he was making when he stipulated for it in six months? This view of the materiality of time becomes stronger when we consider that the whole policy of our state legislation is based on the difference of time here and in older communities. Witness the statute of limitations in its shorter periods allowed for suits, the provisions for the early trial and disposition of matters of litigation, and the like; and the course of business operations in this state has been regulated by the same principle, and has shown a nearer approach to the cash system, or at least a more restricted system of credits than prevails elsewhere. This, indeed, was a necessity arising from obvious causes—the want of confidence in men and titles, and the urgent demand for money to carry on business. In California, where such rapid and sudden fluctuations in the affairs

and fortunes of men occurred as in all history is unexampled, and where the work of years was accomplished in months, it is impossible to hold that time, as an element of past contracts, should be measured by the standards which obtain in old and settled states, where everything is comparatively stable and permanent; where capital is abundant, titles ascertained, and interest is low. The peculiar circumstances, showing the value of punctuality here, call for a corresponding rule, whereby the courts should exact it; and we conceive that it would be as unjust as impolitic and demoralizing to make new contracts for parties by extending time they never intended to give; for it would be to encourage a violation of engagements, and foster a spirit of reckless speculation.

We confine these observations, of course, to the case made by this record, and to analogous facts; they are not meant to apply—for that question is not now before us—to cases in which the vendee has performed the contract on his part, and has merely neglected to call for the legal title; nor are they applicable to all cases of failure of prompt compliance by vendees.

We have not overlooked the fact that in this case the decree was rendered upon proofs, which seek in important respects to vary the case made by the pleadings. But this is immaterial. A plaintiff's case cannot be better as proved than it is as stated. It is a cardinal rule in equity, as in all other pleading, that the *allegata* and *probata* must agree, and that averments material to the case, omitted from the pleading, cannot be supplied by the evidence; or, as said in *Woodcock v. Rennet*, 1 Cow. 711 [13 Am. Dec. 568], "in a court of chancery every material allegation should be put in issue by the pleading." Thus in *Bank of the United States v. Schults*, 3 Ohio, 62, held that "a party cannot travel out of the matter alleged in his bill to make a ground of relief;" and accordingly the court, even upon an agreed state of facts, refused to find upon facts not put in issue by the bill. In *Anthony v. Leftwich*, 3 Rand. 246, Judge Carr says: "It is incumbent on every party who brings his case before a court to state it with reasonable certainty, and to prove it as stated; and this is peculiarly necessary upon a bill for a specific performance." See, for this familiar rule, 3 Greenl. Ev., new ed.

If, however, we entered upon the unnecessary labor of reviewing the mass of testimony, the argument of the appellant's counsel is certainly imposing. It is not easy to say that a case is "free from doubt or suspicion," where the bill implies a contradiction in substance upon its face, of the main facts on which

it rests. Where the original bill avers a tender in 1866, and an excuse for not making it sooner; then an amended bill, after the decision of *Brown v. Covillaud*, 6 Cal. 568, discovers for the first time that the tender was made sooner; then the proofs showing that it was repeatedly made much sooner than last alleged; that the vendees refused to list the property for taxes as theirs, though often applied to, while they gave in their improvements; that the taxes on the land have been ever since suffered to be paid by vendors; that these pretended tenders, except the last, are inconsistent with what the vendees claim in their bill to be their rights, under the contract; that if made for proof—as evidently they were made, if made at all—no better and more satisfactory evidence of demand, etc., has been preserved; that, except the last, they appear for the most part to have been proved by witnesses alone severally present with the parties—the loosest and most unsatisfactory species of evidence admissible in law (as the appellate court of Kentucky terms it); that one of the parties to whom the tender is alleged to have been made is dead, and another insane; that one of the vendors was about this time insolvent; that neither have been shown to be men of property; the inherent improbability that these vendors understood they were to postpone payment until the confirmation of title, for, if rejected, they would get nothing—if confirmed, only the contract price; and when, if they warranted title, at most they would only have to pay back the money; and by delay of confirmation, as it was delayed, the statute of limitations would bar their claim; that this loose verbal evidence is contradicted by the terms of the contract, and to some extent, by the unquestioned acts of the parties; the suspicious circumstances that the attempt legally to enforce the contract is not made, and the formal tender, which seems to be preliminary to it, did not take place until after the confirmation, and the consequent rise in the value of the property; the high rate of interest the vendors were paying, the urgency of their pressure for money, consequently the folly of the contract as alleged, and the apparent want of reason in the vendors' alleged desire to receive the money, or give a deed, before confirmation; and that the claim has been partially assigned;—all these facts, we repeat, certainly weigh very strongly against the case made by plaintiffs to the discretion of the court for equitable relief, when to give it would operate very harshly on one side, and be only a successful speculation without risk on the other.

But it is enough to say that the case made by their bill does

not entitle them to a decree. We therefore reverse the decree below, and direct a decree dismissing the plaintiffs' bill.

TERRY, C. J., concurred.

FIELD, J., having been of counsel in the court below, did not sit in the case.

PLEADINGS MUST BE MOST STRONGLY TAKEN AGAINST PLEADER: *Chipman v. Emeric*, 63 Am. Dec. 80, and citations in note 82; *Lawson v. State*, 50 Id. 238, note 242.

CONTRACT TO GIVE GOOD AND SUFFICIENT WARRANTY DEED of a certain individual's interest in a piece of land does not require a warranty that such person's title is perfect: *Babcock v. Wilson*, 35 Am. Dec. 263; but that a deed good in form only is not a sufficient compliance with the covenant to make a good and perfect deed, and that the general rule is that good title is necessary to make such deed, see *Fremster v. May*, 53 Id. 83; *Greenhood v. Ligon*, 48 Id. 775; *Smith v. Busby*, 57 Id. 207; *Tarwater v. Davis*, 44 Id. 534, and notes.

PARTY TO CONTRACT FOUNDED ON CONCURRENT CONDITIONS seeking to recover for a breach thereof must show that he was ready and willing to perform his part of the agreement: *Smith v. Lewis*, 63 Am. Dec. 180, and note 186; *Sargent v. Adams*, Id. 718, note 724.

VENDEE, BEFORE BRINGING SUIT FOR SPECIFIC PERFORMANCE, must have performed or offered to perform whatever the contract has made a condition precedent on his part: *Young v. Daniels*, 63 Am. Dec. 477, and numerous citations in note 486; *Bodine v. Glading*, 59 Id. 749, note 751.

TIME MAY BE OF ESSENCE OF CONTRACT TO CONVEY LAND; but it is not so in equity unless by express stipulation of the parties, or unless it necessarily follows from the nature and circumstances of the contract: *Young v. Daniels*, 63 Am. Dec. 477, and cases cited in note 486; but the party seeking specific performance must account for his delay: *Lewis v. Woods*, 34 Id. 110; *Rogers v. Saunders*, 33 Id. 635; *Kirby v. Harrison*, 59 Id. 677; *De Cordova v. Smith*, 58 Id. 136, and notes to these cases; and specific performance will not be decreed to assist a party who has delayed payment in order to see whether the contract would prove a gaining or a losing bargain: *Kirby v. Harrison*, 59 Id. 677; *De Cordova v. Smith*, 58 Id. 136, and citations in notes to these cases.

PARTY RESISTING SPECIFIC PERFORMANCE need not show any particular injury or inconvenience; but the party seeking it must show that he has used due diligence, or must account in a reasonable manner for his delay and apparent neglect and omission of duty: *Weber v. Marshall*, 19 Cal. 458-460; and such delay unexplained is fatal to his right to enforce the contract: *Bensley v. Mountain Lake Water Co.*, 13 Id. 316; equity, in refusing relief on the ground of delay, will allow a much shorter time than that fixed by the statute of limitations to operate as a bar: *Orattan v. Wiggins*, 23 Id. 34, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *De Castro v. Clark*, 29 Cal. 16, to the point that a pleading will be taken most strongly against the pleader, because it is presumed that he states his case as favorably for himself as a strict adherence to the truth will permit. It is cited in *McCord v. Seale*, 58 Id. 264, to the point that the *allegata* and *probata* must agree; and see it cited to this point in *Clark v. Phoenix Ins. Co.*, 36 Id. 178; and further, that when a com-

plaint or answer assumes to set out a contract according to its legal effect, and not *in hæc verba*, the allegations must be sustained, nor can the responsibility of the party thereby sought to be charged be established by proof of a contract materially modifying or changing the responsibility to be charged.

GENERAL RULE IN EQUITY IS, that time is not of the essence of a contract to convey lands: *Steele v. Branch*, 40 Cal. 11, citing the principal case.

COMPLAINANT'S EQUITY MUST APPEAR from his bill, or he is entitled to no relief: *Gregory v. Ford*, 14 Cal. 143, citing the principal case.

IT IS SAID IN *Farley v. Vaughn*, 11 Cal. 237, that the principal case was one where there had been long delay to the injury of defendants, and under suspicious circumstances, thus distinguishing them on this point; and *Chater v. N. F. S. R. Co.*, 19 Id. 237, distinguishes the principal case as being one where a party, through the performance of the terms of an executory contract, becomes entitled to property; the principal case is referred to *arguendo* in *Sampson v. Ohleyer*, 22 Id. 204, as having been depended on by plaintiff to bar the rights of defendant.

CARR v. CALDWELL.

[10 CALIFORNIA, 380.]

ONE WHO ADVANCES MONEY TO PAY OFF MORTGAGE given to secure payment of purchase money on a homestead, and who takes a new mortgage from the husband alone for the money advanced, is, upon the death of the mortgagor, entitled to all of the rights of the first mortgagee.

MONEY ADVANCED TO PAY MORTGAGE FOR PURCHASE PRICE OF HOMESTEAD is equivalent to so much purchase money, and the second mortgagee is in equity entitled to be subrogated to the rights of the first.

DEMAND TO BE SUBROGATED TO FORMER MORTGAGEE'S LIEN against the estate of a deceased person, the title to such estate being in some one else, is not a claim against the estate within the meaning of the statute, and suit to enforce such demand is properly brought in the state district court.

THE opinion states the facts.

Vories and Archer, for the appellant.

A. L. Rhodes, and Wallace and Ryland, for the respondent.

By Court, BALDWIN, J. Carr, the plaintiff below, filed his bill to subject to sale a lot in San José. It seems that one Vermule bought this lot in 1853 of one Gordon (one Patton holding the title as trustee) on credit, giving a mortgage for the purchase money; in 1854 some seven hundred dollars were due after deducting the payments. For this balance Gordon sued Vermule, and obtained a decree of foreclosure and sale. On the day advertised for the sale, and just as it was coming off, Vermule borrowed some money of Carr, a part of which was to be applied to the payment of this decree and mortgage, and a

mortgage to be executed to Carr on this property. The money, or enough of it, was so applied, and the mortgage of Gordon satisfied, when, or within a few minutes thereafter, Vermule—his wife not joining in the deed—conveyed by mortgage to Carr in pursuance of this arrangement. At the time of this arrangement the lot was occupied as a homestead. Vermule died shortly afterwards. The lot was set off, by proceedings under order of the probate court, to the widow, as homestead property. The claim of Carr was presented to the defendant Caldwell, administrator of Vermule, and allowed, but the estate was, and is, entirely insolvent. This suit was brought in the district court. Carr claims that the mortgage of Gordon having been paid off by money loaned by him to Vermule for that purpose, under agreement to give him a mortgage on the premises for his loan, he ought to be permitted to stand in the place of Gordon; and it would seem, on every principle of justice and equity, that he is right. We think his claim is clear in law as it is in justice. The proof shows that the execution of Carr's mortgage was made on the same day—one witness states within ten minutes—of the date of the payment of Gordon's decree. The satisfaction of Gordon's mortgage, and the execution of Carr's, may be said to be contemporaneous acts. It cannot be doubted that if the note and mortgage of Gordon had been renewed the homestead would have continued bound. Can it make any difference in equity whether the first debt be renewed or another debt—if it be another—for the same sum created to raise money to pay off the first? A clear title to the homestead could not vest until the payment of the purchase money. In equity and in effect the advance of the money by Carr, under the circumstances, to pay off the purchase money due, was equivalent to so much purchase money. The debt was to all intents and purposes the same, though the creditor was changed. The authorities cited by the respondent, and especially *Marriot v. Davey*, 1 Dall. 164; *Kauffman v. Myer*, 6 Watts, 134; *Bemus v. Quiggle*, 7 Id. 362; and *Dillon v. Byrne*, 5 Cal. 455; *Marsh v. Rice*, 1 N. H. 168, support this view; and if we could find no case to support it, the sense and apparent justice of the rule would go far towards inducing us to adopt it.

Nor is the ground taken by the appellant, that the district court had no jurisdiction, sustainable. This is not a claim, in the sense of the statute, against the estate of the deceased. The administrator was a proper party for the purpose of liquidating the amount of the indebtedness. But the main purpose of the

bill is not to obtain a decree for and sale of property of the decedent, nor to affect assets in the hands of the administrator, but to subject land bound for the debt of the decedent, which does not belong to his estate, but the title to which is in the defendant, Jane Vermule. Whether the plaintiff can subject it or not, it does not belong to the estate of the decedent. None of the evils at which the statute aims in denying a right of suit to a party against an administrator has any application to such a case; while no course of proceeding that we are aware of could compel or authorize an administration of this property by the probate court or the administrator. So that if this proceeding be not proper, we know of no other that would reach the case. A clear right would exist without a remedy. Besides, the administrator is not here to complain, and could not if he were.

We think the decree should be affirmed.

TERRY, C. J., and FIELD, J., concurred.

SIMULTANEITY OF RELEASE OF ONE MORTGAGE AND GIVING ANOTHER ON the same property to the same mortgagee does not avoid the loss of the first mortgage lien by the release: *Woollen's Ex'rs v. Hillen's Ex'rs*, 52 Am. Dec. 690, note 693; but that an assignee stands in the mortgagee's place, see *Hills v. Elliot*, 7 Id. 26, and *Brown v. Blydenburgh*, 57 Id. 506, and note 508.

LAST MORTGAGEE IS IN EQUITY the assignee of the debts which he pays, and is subrogated to the rights of his assignor: *Swift v. Kraemer*, 13 Cal. 530, citing the principal case.

HOMESTEAD EXEMPTION CANNOT BE INTERPOSED against a claim for its purchase money, for no man shall enjoy property as a homestead, or an improvement thereon, as against the just claims of the party who procured it for him: *Nichols v. Overacker*, 16 Kan. 59, citing the principal case.

WITHOUT QUESTIONING CORRECTNESS or denying the doctrine of the principal case, it is distinguished in *Guy v. Du Uprey*, 16 Cal. 199, and *Burnap v. Cook*, 16 Iowa, 154.

EMERIC v. GILMAN.

[10 CALIFORNIA, 404.]

PRIVATE PROPERTY OF INHABITANT OF COUNTY IS NOT LIABLE TO SEIZURE and sale under execution to satisfy a judgment against the county.

CREDITOR OF COUNTY MUST LOOK TO ITS REVENUES alone for payment.

CALIFORNIA STATUTE AUTHORIZES SUIT AGAINST COUNTY, but gives no remedy by execution. When judgment is rendered against it, it is the duty of the supervisors to pay the claim of the judgment creditor out of funds in the county treasury, provided there be funds not otherwise appropriated; or if there is no fund, and they possess the power, they

must levy a tax for the purpose of payment; and if they fail or refuse to pay, or to levy the tax, the creditor can resort to *mandamus* against them; but if there is no fund, nor power to tax, the legislature must be invoked for authority.

APPLICATION for an injunction to restrain the sale of the private property of plaintiff. Defendant recovered a judgment against the county of Contra Costa. Execution issued, and was levied upon the public buildings of the county, and also upon the funds in the hands of the county treasurer; but it was decided that defendant had no right to seize said property: See *Gilman v. Contra Costa Co.*, 8 Cal. 52. He then caused an *alias* execution to issue and be levied upon certain real estate belonging to plaintiff, who was a resident of the county at the time that the said judgment was rendered. It was admitted that the property thus levied upon was no more the property of the county than that of any other of its inhabitants. It was also admitted that before the levy of the *alias* execution demand was made of plaintiff for payment of the judgment. Plaintiff obtained a perpetual injunction, and defendant appeals.

G. F. and W. H. Sharp, for the appellant.

E. W. F. Sloan, for the respondent.

By Court, FIELD, J. The only question presented for consideration is, whether the private property of an inhabitant of a county is liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county.

In support of the affirmative of this question several authorities are cited by the appellant, principally from the reports of Massachusetts and Connecticut. Upon examination, they will be found to admit that the doctrine sustained by them is peculiar to the New England states.

In Massachusetts the individual liability of the inhabitants of towns and parishes is treated as an exception to the general rule, and is founded upon immemorial usage: 5 Dane's Abr. 158; *Chase v. Merrimack Bank*, 19 Pick. 568 [31 Am. Dec. 163]; *Gaskill v. Dudley*, 6 Met. 552 [39 Am. Dec. 750].

In *Beardsley v. Smith*, 16 Conn. 374 [41 Am. Dec. 148], a judgment was recovered against the city of Bridgeport, a municipal corporation—a circumstance which does not effect the principle in question—and the court, in holding that the execution issued upon the judgment might be levied upon and satisfied out of the private property of an individual member of the corporation, says: "We know that the relation in which the

members of municipal corporations in this state have been supposed to stand in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them for some purposes as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts."

We are unable to find any adjudged case in the other states going to the extent of the courts in New England, and, as we have seen, the rule is there regarded as peculiar, or founded on immemorial usage. There appear to us insurmountable difficulties in the way of any just application of the rule. The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment, or the levy of the execution; those who opposed the creation of the liability may be subjected to its payment, whilst those by whose fault the burden has been imposed may be entirely relieved of responsibility. Again: it is a settled principle that whenever one of several is held liable for their joint debt, he may have recourse, upon its payment, to the others for contribution. To enforce this right against the inhabitants of a county, even where its population is small, would lead to such a multiplicity of suits as to render the right utterly valueless. Or if, as might be the case, the party should institute his action against the county for the amount which he had thus paid on its account, and recover judgment, he might, in turn, levy upon the property of another inhabitant, and even of the original creditor himself, if he should also be an inhabitant of the county. And it might be insisted that the creditor, if an inhabitant of the county, was only entitled to a proportional part of his judgment from the inhabitants; or why might not the entire judgment be satisfied out of his own property? If all the private property of the inhabitants of a county may be indiscriminately seized by the officer, we do not perceive any ground for excepting that of the creditor himself. And if a contribution was sustained, the person who was compelled to pay more than his share would be obliged to resort to a similar remedy, and thus there would be such a continuing series of difficulties and inconveniences attending the assertion of the rule for which the appellants contend as to render it a source of far greater evil than good.

In *Russell v. Men of Devon*, 2 T. R. 667, an action was brought

against the men dwelling in the county for an injury sustained by an individual in consequence of a breach of their duty in not keeping a bridge in repair; and Lord Kenyon, C. J., held that there was no law or reason for supporting the action against the defendants, and observed that, "if it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose." And in the same case Ashhurst, J., said. "It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained; namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case: that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now, if this action could be sustained the public would suffer a great inconvenience; for, if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy."

Whoever becomes a creditor of a county must look to its revenues alone for payment. The statute has authorized a suit against the county by which his demand may pass into judgment, but it has given no remedy by execution. When the judgment is rendered, it becomes the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds, or to exercise the power, he can resort to a *mandamus*. But if they have no funds, and the power to levy the tax has not been delegated to them, the legislature must be invoked for additional authority: Act to create a board of supervisors, sec. 24; Practice act as amended, sec. 219; *Gilman v. Contra Costa County*, 8 Cal. 52 [68 Am. Dec. 290]; *Wilson v. Commissioners of Huntington*, 7 Serg. & R. 199.

Judgment affirmed.

TERRY, C. J., concurred.

COUNTIES ARE NOT LIABLE TO GARNISHMENT: Note to *Divine v. Harrie*, 18 Am. Dec. 203, discussing the question and citing the principal case; and that a county cannot sue or be sued except when specially permitted by statute, see *Hunsaker v. Borden*, 63 Id. 130, and note to *McLoud v. Selby*, 27 Id. 695.

THERE MAY BE NO REMEDY AGAINST COUNTY for its debt created by authority of law: *Hunsaker v. Borden*, 63 Am. Dec. 130, note 132.

MANDAMUS IS PROPER REMEDY TO COERCE LEVY OF TAX, where one is entitled to a warrant on a judgment, and there is no money in the treasury: *Board of Police etc. v. Grant*, 47 Am. Dec. 102, note 107; see also *State v. North Eastern R. R. Co.*, 67 Id. 551, note 553.

PROPERTY OF CITIZEN CANNOT BE TAKEN to satisfy a judgment against a county or town, and if the supervisors have the power to tax, they may be compelled by *mandamus* to levy the tax and pay the claim: *Hart v. Burnett*, 15 Cal. 586; so where they refuse to act upon a claim presented alleging want of legal authority, *mandamus* is the proper remedy by which the claimant may test this preliminary jurisdictional question: *People v. Supervisors*, 23 Id. 431, both citing the principal case.

JUDGMENT AGAINST COUNTY has the effect of converting a disputed into an audited claim: *Sharp v. Contra Costa Co.*, 34 Cal. 291; but the revenues raised for other purposes cannot be applied by the claimant to pay his debt: *Rose v. Estudillo*, 39 Id. 275, both citing the principal case.

FULLER v. HUTCHINGS AND SWEETZER.

[10 CALIFORNIA, 523.]

GAMING IS PROHIBITED BY STATUTE IN CALIFORNIA. The consideration for a debt contracted thereat is illegal as between the parties, and as to all persons except *bona fide* holders without notice. A check given in payment of such debt is void.

CHECK TRANSFERRED AFTER DISHONOR IS TAKEN SUBJECT TO ALL DEFENSES which existed when in the hands of the first holder.

PRESUMPTION IS THAT CHECK IS GIVEN UPON VALID CONSIDERATION, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration.

SURPRISE IS NOT GROUND FOR NEW TRIAL when based upon ignorance of law.

ACTION upon a check, which it was admitted was given by Hutchings to one Chapman in payment of losses at a banking-game known as "faro." Chapman, on the day of its execution, presented it for payment, and was refused. It was afterwards transferred to plaintiff; but there was no evidence that he at that time had any knowledge of its consideration. Judgment was rendered for defendants. Plaintiff moved for a new trial on affidavits, the substance of which are sufficiently stated in the opinion. Motion for a new trial denied, and plaintiff appeals.

G. F. and W. H. Sharp, for the appellant.

Cook and Fenner, for the respondents.

By Court, FIELD, J. The question presented in this case is, whether the illegality of the consideration for which the check was given is available as a defense against the plaintiff. As between the parties, it is not denied that the consideration may be inquired into. As between them, the consideration was illegal. Gaming is prohibited by statute; it is declared to be a felony in the keeper of the game, and a misdemeanor in the player. As to all persons except a *bona fide* holder without notice, the check is void. The statute so expressly declares, and such would be the rule of law independent of the statute. And there is little doubt that the check passed to the plaintiff after its dishonor by the bankers. It was given to Chapman, and was presented for payment by him—a circumstance which justifies the inference that he held it at the time as he held it originally. And if transferred after dishonor, the plaintiff took it subject to all the defenses to which it was subject in the hands of the first holder.

Even had it been transferred to the plaintiff before dishonor, the illegal consideration being admitted, it devolved upon him to show that he took it without notice and for value. With checks as with promissory notes, the presumption is that they are given upon a valid consideration, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration: Story on Prom. Notes, sec. 196; *Duncan v. Scott*, 1 Camp. 100; *Rees v. Marquis of Headfort*, 2 Id. 574; *Munroe v. Cooper*, 5 Pick. 413; *Holme v. Karsper*, 5 Binn. 469. This the plaintiff did not do, and there was no error, therefore, in the rendition of judgment against him.

The motion for a new trial was properly overruled. There is no excuse offered in the affidavit of the plaintiff for omitting to prove that he was an innocent purchaser; and there is no weight to be given to the excuse offered by the attorney, that he supposed the facts admitted would not be allowed in evidence, unless followed by proof that the plaintiff received the check with notice, and was taken by surprise when the counsel of the opposite party read to the court authority for the notice he had served, requiring the plaintiff to prove the consideration paid for the check. The surprise alleged is only that the law was different from what the attorney supposed it to be—a state of feeling

which, in numerous instances, under like circumstances, has been experienced by other counsel, but has never availed to obtain a new trial.

Judgment affirmed.

BALDWIN, J., concurred.

NOTE FOR MONEY WON AT GAMING is void, even in the hands of an innocent and *bona fide* assignee: *Williams v. Judy*, 44 Am. Dec. 699; and an action cannot be maintained upon a check shown to have been given in pursuance of a bet, in Pennsylvania: *Edgell v. McLaughlin*, 36 Id. 214; see also notes to these cases, containing citations to others in this series.

MISTAKE AS TO LEGAL EFFECT OF EVIDENCE is not such surprise as warrants a new trial: *Sanford Mfg. Co. v. Wiggin*, 49 Am. Dec. 198.

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL, alleging newly discovered evidence and surprise, in this, that plaintiff was surprised at the admission of a certain party as a witness, his attorney having advised him that he could not be admitted, and that he was further surprised at the testimony given by such witness, is not sufficient ground to entitle a party to a new trial: *Kloppenbaum v. Pierson*, 22 Cal. 163, citing the principal case.

WHITNEY v. HIGGINS.

[10 CALIFORNIA, 547.]

PARTIES AND PRIVIES ARE ALONE BOUND BY JUDGMENT; a party cannot be affected by a suit to which he is a stranger.

DECREE FOR SALE OF PROPERTY TO ENFORCE MECHANICS' LIEN has, in California, the same effect upon rights of purchasers and incumbrancers prior to the commencement of suit that a similar decree would have upon the foreclosure of a mortgage.

AT TIME SUIT IS INSTITUTED TO ENFORCE MORTGAGE OR MECHANICS' LIEN all persons interested in the estate should be made parties or their rights will not be affected.

PERSON ACQUIRING INTERESTS BY CONVEYANCE OR INCUMBRANCE AFTER SUIT BROUGHT to enforce a mortgage or mechanics' lien is bound by the decree, and need not be made a party.

PARTIES TO FORECLOSURE SUIT IN WHICH JUDGMENT IS RENDERED under which sale is made are restricted to the statutory period of six months in which to redeem. Their rights, after decree, depend entirely upon the statute, and they have no equity. Such is also the case with parties acquiring interests pending suit to enforce previously existing claims; they take in subordination to any decree which may be rendered, as do those whose interests are acquired after judgment docketed or sale made.

PARTIES ACQUIRING INTERESTS SUBSEQUENT TO PLAINTIFF IN FORECLOSURE SUIT, and before its commencement, who are not made parties, possess both an equitable and the statutory right to redeem.

The opinion states the facts.

Hale, Tuttle, and Hillyer, for the appellant.

Crocker and Myers, for the respondent.

By Court, FIELD, J. The plaintiff purchased the premises at a sale upon a decree rendered in a suit to foreclose a mortgage executed on the twenty-first of February, 1856. The defendant claims under a purchase at a sale made upon a decree rendered in a suit to enforce a mechanics' lien which attached on the eighteenth of January, 1856. The property was not redeemed from either sale, and the sheriff executed a deed to the plaintiff June 27, 1857, and to the defendant on the thirtieth of December following. The plaintiff was one of the mortgagees, and neither he or his co-mortgagee was made a party to the suit to enforce the mechanics' lien; and the present bill is filed to redeem the premises from the sale under the decree rendered in that suit. The defendant demurred to the bill, the demurrer was sustained, and from the judgment rendered thereon the plaintiff appeals.

The conveyance to the plaintiff took effect, by relation, at the date of the mortgage, the twenty-first of February, 1856. By it the plaintiff acquired all the estate which the mortgagor possessed in the property on that day. He therefore stands in precisely the same position as though he had purchased the property of the mortgagor at that time; and the question is thus presented—and it is the only question in the case—whether a subsequent purchaser possesses, after the expiration of the six months allowed by statute, a right to redeem property sold to enforce a mechanics' lien, upon a decree rendered in a suit to which he was not made a party.

The suit to enforce the mechanic's lien was instituted, and the decree rendered therein, before the execution of the deed to the plaintiff, though not until after the sale to him, and the defendant contends that the lien of the mortgage was waived by a failure of the mortgagees to present it in that suit. To this it may be answered: 1. That the liens which must be presented under the seventh section of the mechanics' lien law of 1856 are those arising under that act; and 2. If this were otherwise, that the act was passed on the nineteenth of April, 1856, and its provisions do not apply to or affect any previously acquired liens: Laws of 1856, c. 134, secs. 7, 11.

The plaintiff's claim to the relief he seeks rests upon the general principle that the rights of a person cannot be affected by a suit to which he is a stranger. By the judgment in a suit,

parties and privies are alone bound. The estate of Stephen had passed from him by the proceedings under the foreclosure, and as, had it continued, his rights could not have been cut off without his day in court, so neither can the rights of the plaintiff, his successor, be thus defeated.

Though the lien of mechanics is purely the creature of the statute, a decree for the sale of the premises in its enforcement has the same and no greater effect upon the rights of purchasers and incumbrancers, prior to commencement of suit, than a similar decree would have upon the foreclosure of a mortgage. If such purchasers or incumbrancers are not made parties, they are, in no respect, bound by the decree or proceedings thereunder. A mortgage in this state is only a lien or incumbrance; the estate in the land remains in the mortgagor, and all persons interested in the estate at the time the suit is instituted to enforce the mortgage, whether purchasers, heirs, devisees, remaindermen, reversioners, or incumbrancers, should be made parties, or their rights will not be affected. The same is true as to suits to enforce a mechanics' lien. "The mortgagee," says Kent, "must make all incumbrancers, prior and junior, existing at the filing of the bill, parties;" and the reason he assigns for the rule is, "to give security and stability to the purchaser's title, for he takes a title only as against the parties to the suit; and it cannot and ought not to be set up against the existing equity of those incumbrancers who are not parties:" 4 Kent's Com. 185. In *Haines v. Beach*, 3 Johns. Ch. 459, a prior mortgagee had foreclosed his mortgage without making a subsequent mortgagee and subsequent judgment creditors parties; and, upon a bill filed by the executors and heir of the deceased junior mortgagee, the plaintiffs were held entitled to redeem. "It was the duty of Gardner (the first mortgagee)," says Kent, "to have made the younger mortgagee a party to his bill; and all incumbrancers existing at the commencement of the suit are entitled to be parties, for they have an interest to be affected, and ought to have an opportunity of paying off the prior incumbrances. The injustice that would be produced if they were to lose their rights because they are not made parties is very apparent. The rule, therefore, has been well settled and uniformly supported, that the subsequent incumbrancers must be parties, and if omitted, the decree will not bind their rights." And again: "The necessity of making the subsequent incumbrancers parties, or holding their rights unimpaired, appears to be much stronger, and indispensable to justice, in cases of decrees for sales, according to

our practice; for otherwise the mortgagor would take the surplus money, or the cash value of the equity of redemption, and defeat entirely the lien of the subsequent creditor. But their rights cannot be destroyed in this way, and the purchaser will take only a title as against the parties to the suit, and he cannot set it up against the subsisting equity of those incumbrancers who are not parties:" *Godfrey v. Chadwell*, 2 Vern. 601; *Bishop of Winchester v. Beavor*, 3 Ves. 314; *Hobart v. Abbot*, 2 P. Wms. 643; *Watson v. Spence*, 20 Wend. 260; *Lyons v. Sandford*, 5 Conn. 554; *Cooper v. Martin*, 1 Dana, 25; *Rodgers v. Jones*, 1 McCord, 221; Story's Eq., sec. 1023; *Williamson v. Field's Ex'rs*, 2 Sandf. Ch. 533.

But as to persons who acquire interests by conveyance or incumbrance after suit brought, it is not necessary to make them parties. They are bound by the decree. The rule is thus stated in Story's Eq. Pl., sec. 194: "But incumbrancers, who become such *pendente lite*, are not deemed necessary parties, although they are bound by the decree; for they can claim nothing except what belonged to the person under whom they assert title, since they purchase with constructive notice; and there would be no end to suits, if a mortgagor might, by new incumbrances, created *pendente lite*, require all such incumbrancers to be made parties." In *Bishop of Winchester v. Beavor*, *supra*, the master of the rolls observed that a judgment confessed after a bill filed would not do. And in *Cook v. Mancius*, 5 Johns. Ch. 94, Kent held that a person becoming an incumbrancer *pendente lite* was not entitled to redeem, unless under special circumstances. "If the plaintiff," observes the chancellor, "had been a judgment creditor at the commencement of the suit to foreclose the mortgage, the mortgagee would have been bound to have made him a party, or else the decree and sale would not have taken away his right to redeem, even as against Mancius, the purchaser. This principle was discussed, and sufficiently explained, in the case of *Haines v. Beach*, 3 Id. 459, and in the authorities there referred to. But the present plaintiff became an incumbrancer *pendente lite*, and therefore, according to the doctrine in the case of *Bishop of Winchester v. Paine*, 11 Ves. 194, it was not necessary that he should have been made a party, and he has no right to redeem."

This consideration of the proper parties to a suit of foreclosure, and the effect of the decree upon the rights of persons interested in the mortgaged estate, clearly establishes the title of the plaintiff to redeem. The principles which govern as to

parties in those suits apply equally to suits for the enforcement of a mechanics' lien. The mortgage under which the plaintiff claims was placed upon the premises before suit was brought; the mortgagees, as subsequent incumbrancers, were necessary parties to the suit; not being made such parties, they were not bound by the decree or sale under it. The plaintiff, by his purchase, took the title as it existed in the mortgagor at the date of the mortgage; his position in court, therefore, is that of the owner of the legal title, subject to the mechanics' lien. The defendant, as assignee of the purchaser under the decree upon that lien, is substituted to the rights of its original holder, and is entitled to the amount due upon that lien to the extent of the money paid upon the purchase.

The case of *Lyon v. Sandford*, 5 Conn. 544, is in point, and is in fact much stronger than the case at bar. In that case the equity of redemption had been attached by a creditor of the mortgagor, and it was held that a decree of foreclosure on a bill brought subsequent to the service of the attachment did not affect the rights of the attaching creditor, he not having been made a party to the suit, and that, having afterwards recovered judgment and levied his execution upon the premises, he was entitled to redeem on paying the prior incumbrances, notwithstanding the decree of foreclosure against the mortgagor. "It is objected," says the court, "that if creditors attaching the interest of the mortgagor before the commencement of the process for foreclosure are necessary parties, creditors who attach afterwards must also be made parties; and that a mortgagee would never be able to make all persons parties who might, between the filing of the bill and the final decree, acquire a lien upon the premises. But such conclusion will not follow from the principle which is adopted by this decision.

"It is a general rule applicable to chancery proceedings, that all persons interested in the subject-matter of the suit at the time of bringing the bill shall be made parties in the cause; and should the death of any defendant happen during the pendency of a suit, whereby the interest of such defendant devolves upon others not already parties, such persons must also be made parties. But when a defendant to a bill in chancery, after the commencement of a suit, attempts to alienate or convey the subject-matter of such suit by voluntary contract, the purchaser, it is believed, need not be made a party to the bill; but his interest, acquired *pendente lite*, will be bound by the event of the

suit, which was properly commenced. And so in respect to creditors who attach property mortgaged during a pendency of a petition to foreclose; the lien which they acquire is by their own voluntary act subsequent to the commencement of the suit, and they will be bound by the decree, though not parties. They must necessarily abide by the fate of the mortgagor, whose estate they have attempted to acquire."

If an incumbrancer, prior to suit brought, not being made a party, is entitled to redeem, *a fortiori* is a purchaser of the entire estate subsequent to the lien and before suit entitled to make a redemption.

The counsel of the respondent appears to have confounded the equity of redemption with the right to redeem from a sale on execution under the statute. The statutory right in some instances exists where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, are restricted to the six months given by statute, for they have had their day in court, and their rights after decree depend entirely upon the statute. Parties acquiring interests pending suits to enforce previously existing liens, taking their interests in subordination to any decree which may be rendered, have no equity, and are confined to the rights given by the statute, and so, as a consequence, are those whose interests are acquired after judgment docketed or sale made; but parties obtaining interests subsequent to the plaintiff, and before suit brought, who are not made parties to such suit, possess both the equitable and the statutory right. They may redeem under the statute, or they may file their bill in equity.


The plaintiff is within this last class. He occupies, as we have already observed, by his purchase, the same position as the mortgagor, and possesses the legal title, subject only to the previous incumbrance of the mechanics' lien. As the mortgagees were not made parties to the suit to enforce that lien, he is entitled, like them, to come into a court of equity to redeem the premises.

It follows that the court below erred in sustaining the demurrer, and the judgment rendered for the defendant thereon must be reversed, and the cause remanded for further proceedings.

Ordered accordingly.

TERRY, C. J., and BALDWIN, J., concurred.

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SUBSEQUENT INCUMBRANCERS and all parties interested in the subject-matter must be made parties to a suit to foreclose a mortgage, and unless this is done, their rights will not be affected by the decree: *Montgomery v. Tutt*, 11 Cal. 314; and as a foreclosure suit is intended, as against younger mortgagees, to cut off the right of redemption, a person not made a party is unaffected by a decree and sale: *Carpentier v. Brenham*, 40 Id. 238; but a party who purchases *pendente lite* with notice of *lis pendens* is bound by the decree of foreclosure: *Horn v. Jones*, 28 Id. 204, all citing the principal case.

THE PRINCIPAL CASE IS CITED and approved to the points contained in the last two subdivisions of syllabus *supra*, in *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 526; *Goodenow v. Ewer*, 16 Id. 468; and *Eldridge v. Wright*, 55 Id. 536.

JUDGMENT IS CONCLUSIVE ONLY AGAINST PARTIES AND PRIVIES: *Winston v. Westfeldt*, 58 Am. Dec. 278, and citations in note 281.

MECHANIC'S LIEN SHOULD BE ENFORCED by making all parties interested in the land parties to the suit, as the rights of those not made parties are not affected by the decree: *Williams v. Chapman*, 65 Am. Dec. 669, and note 672.

PURCHASER OF MORTGAGED PREMISES IS BOUND BY JUDGMENT OF FORECLOSURE rendered against the mortgagee, although he is not made a party to the suit: *Knowles v. Lawton*, 63 Am. Dec. 290, note 298; see also *Bates v. Buddick*, 65 Id. 774.

REDEMPTION OF LAND cannot be accomplished otherwise than by strict compliance with the statute: *Waller v. Harris*, 32 Am. Dec. 590, note 597; but a grantee of an equity of redemption has a right to redeem, notwithstanding a foreclosure and sale, when he is not made a party to the proceedings: *Bradley v. Snyder*, 58 Id. 564, note 569.

ALL PARTIES INTERESTED IN PREMISES PRIOR TO SUIT brought to enforce a mechanic's lien, whether purchasers or incumbrancers, must be made parties to the suit; otherwise their interests will not be affected: *Van Winkle v. Stow*, 23 Cal. 459; *Gamble v. Voll*, 15 Id. 510, both citing the principal case.

PEOPLE EX REL. MCKUNE v. WELLER.

[11 CALIFORNIA, 49.]

IT IS NECESSARY TO VALIDITY OF ELECTION THAT GOVERNOR SHOULD ISSUE PROCLAMATION calling such election, and enumerating the offices to be filled thereat. An office not mentioned in such proclamation cannot be filled at such election.

STATUTES PROVIDING THAT GOVERNOR MUST GIVE NOTICE BY PROCLAMATION CERTAIN NUMBER OF DAYS BEFORE ELECTION of the offices to be filled thereat are mandatory. It is no answer to say that because the constitution provides for the filling of certain offices at the general election such statutes may defeat its operation; as, in case the vacancy occurs immediately before such general election, and after the time for issuing such proclamation had elapsed.

REASON REQUIRING ISSUANCE OF ELECTION PROCLAMATION IS TO GIVE ELECTORS NOTICE that an election is about to be held, and of the offices to be filled thereat.

APPLICATION to the district court for a writ of *mandamus*. In 1852 A. C. Monson was elected judge of the sixth judicial district, at the general election held in that year. He resigned in that year, and C. T. Botts was by the governor appointed his successor. Monson's term was to expire January 1, 1859. In the governor's proclamation before the general election in 1858, he did not specify that an election would be held of a person to serve for the remainder of Monson's term. At the general election of 1858 the relator, John H. McKune, received a majority of the votes cast for aspirants for that position, and received from the proper county officer a certificate of his election. The governor refused to give him a commission thereupon, and this proceeding was instituted to compel him to do so. The writ was refused by the court below, and the relator appealed.

Currey and Crocker, for the appellant.

Thomas H. Williams, attorney-general, for the respondent.

By Court, BALDWIN, J. The first question which is made is as to the right of the relator to the office he seeks, or to the commission as evidence of that right. The objection has been taken by the attorney-general, that considering that the short term thus described might have been filled by election, if otherwise regularly had, yet there was no legal election in September, 1858, for a judge for that term, because no proclamation was made of such election by the governor. It is urged in reply, by the counsel of the relator, that an election for an office of this character, and held under the general law, does not depend for its validity upon any act of the executive, but rests upon the constitutional right of the voters to select the incumbent, and upon the general statute prescribing the time, place, and manner of the election. This precise question has never been decided in this state, though the counsel on both sides have cited cases (which we purpose reviewing) to maintain that in principle the question has been decided in favor of their respective views.

By statute (Wood's Dig. 375, art. 2116, sec. 5), it is made the duty of the governor, at least thirty days before any general election, to issue his proclamation, designating the offices to be filled at such election, and to transmit a copy thereof to the board of supervisors of each county of the state; and by the succeeding section it is made the duty of the board of supervisors to give at least ten days' notice thereof, by posting or causing to be posted up at each place of holding elections in

their county a copy of such proclamation, and to insert the same in some newspaper published in the county, if any be so published.

The statute having required that the proclamation of the governor and notice by the supervisors shall be made previous to the election, it would seem to devolve upon the relator to show very clearly that these acts were not necessary to the validity of his election. It may be a difficult matter to define with precision the limits between those acts prescribed by the sovereign authority which are directory—that is, which may be obeyed or not, without affecting the validity of an act, and those which do affect it. Complaint is often made, and not without reason, that courts have sometimes gone too far, in practically setting aside or holding nugatory the positive provisions of the statutes; for it is obvious that where statutes affix no penalty for non-observance, and it is held that the provisions of them do not affect the validity of the acts to which those provisions relate, it is nearly the same thing to hold the acts valid, and to hold that these provisions are entirely inoperative. A brief review of the authorities cited by the counsel of the appellant will go far to show where the true line of distinction is between statutes directory in their character and those the provisions of which must be substantially followed in order to impart validity to the acts to which they relate. In order to ascertain this fact, and determine the necessity of the notice of this election, and the effect of a want of it, we propose to examine these cases in their order.

The first case cited in point of time is that of *Rex v. Lordale*, 1 Burr. 445, in which it is said (p. 447) that there is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament and clauses merely directory. The precise time in many cases is not of the essence. The illustration of this rule is given in the case of *Rex v. Sparrow*, 2 Stra. 123, in which it was held that though the justices had been guilty of neglect in not appointing overseers of the poor within the time specified by the statute, yet that they might be compelled to discharge this duty at a subsequent time. In Smith's Commentaries on Statutory and Constitutional Construction, pp. 792, sec. 679, the author, after citing and approving this doctrine, says: "A distinction in the application of the rule in the cases cited should be observed, that is, between cases where certain acts to be done are of the essence of the thing required to be done by the act, in which case it is im-

perative, and things which are not of the essence; in the latter case it is merely directory; and this is one of the criterions by which to determine whether the requisition is imperative or merely directory." Lord Mansfield says: "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament and clauses merely directory. The precise time in many cases is not of the essence." This distinction prevailed in the case of the *Thames Manufacturing Co. v. Lathrop*, 7 Conn. 550. In that case a statute required the assessors to return an abstract of their assessment lists on or before the first day of December in each year, and the question arose whether an assessment was valid when the assessment was not returned until after the time specified in the act. The court held that the general statute had been made for the assessment of taxes, by which assessors were to be chosen, whose duty it was to receive lists of all the inhabitants, and having perfected them by adding property omitted, by valuation of the items, and by the requisite assessments, to return an abstract of the lists to the town clerk, on or before the first of December in each year. The lists and valuation of the town clerk were directed to be submitted, when requested, to the inspection of every person liable to pay taxes. A board of review was constituted to hear appeals from the doings of the assessors, and having given not less than ten days' notice, they were to meet on or before the first Monday of January in each year, to determine the appeals made to them. The assessment list, as annually made and corrected, was the rule for the apportionment of taxes to individuals.

From this view of the law, it appeared to be a positive provision that the lists should be returned to the office of the town clerk on or before the first of December in each year. This direction was imperative, and was alone alterable by the legislature. The court must take the law as they found it, and could not say that a return after the first of December was valid, unless they assumed the character of law-makers. The reason of this legislative provision was very apparent. It was for the general benefit of every inhabitant of the towns that each might inspect the list of his estate, and if he believed injustice done him, that he might appeal for its correction to the board of review. A time for the return of the lists should be limited, the general convenience demanded it, and that it should be sufficiently early for universal inspection and preparation for a future hearing before the board of review, was perfectly obvious.

On this principle, the legislature appointed the first of December as the ultimate period of the return. This branch of the law was imperative, and as unchangeable by the courts as any other; and were it within their competency, it would be as difficult to assign a period more reasonable. That the return should punctually be made was indispensable. A different principle would nullify the law and produce the general inconvenience arising from an unlimited return. No person in such case could know when he might inspect his list; and if the return was late, no time either for reflection or preparation for a review could be had. If a legislature, in a charter of incorporation, had authorized the laying of taxes upon lists returned to a public office at a specified time, the necessity of a strict observance of limitation would not admit of a question. The case before the court was strictly analogous to the one supposed. The general law was an enabling act to all the towns; it had prescribed the subjects of taxation and the mode, and as there was no authority to tax except what was conferred by the law, it must be strictly observed. It had been inquired whether the returns of the abstract of the lists by the town clerk to the controller must be by the first of March in each year, according to the provisions of the act in question; and if not, whether the legislature is precluded from laying taxes upon the assessment lists. Unquestionably it is not. The case put and the one under discussion were in no respect analogous. The abstract assessment lists of the towns must be strictly returned to the town clerk, or there was no legal assessment. But if a town clerk does not return to the controller an abstract of the assessment lists, pursuant to the provisions of the law, the list was not invalidated, but he was subjected to a penalty.

Striker v. Kelly, 7 Hill, 9, is cited; but that case only holds that where a statute declares that the common council should vote by ayes and noes, the provision on that subject in the charter of New York was merely directory. In that case Judge Bronson dissented, and we are inclined to think had the best of the argument. In *People ex rel. Smith v. Peck*, 11 Wend. 605 [27 Am. Dec. 104], the principle declared in head-note is that an election of trustees of a church is good although the requirements of the statute in respect to the notice of such election have not been complied with, provided the election was fairly conducted, and there is no complaint of want of notice. But this note of the reporter is broader than the decision of the court; for Judge Savage says: "The judge stated to the jury

that the election was not necessarily void because the notice given by the trustees to the minister was less than one month, etc., and did not contain the names of the trustees whose seats became vacant, and was not announced for two successive sabbaths, provided the election was fairly conducted, and all in fact had notice; but if the omissions were fraudulently made, or the election had thereby been prejudiced, then the omission should invalidate the election. All this, I think, is sound doctrine." In *People v. Runkle*, 9 Johns. 147, the court says: "We must give the statute a reasonable and liberal construction for the benefit of the churches. See also *Trustees v. Hills*, 6 Cow. 23. The object of the notice is, that the voters may be fully apprised of the election, and may attend and exercise their rights. There is no pretense in this case that every voter was not present, for they appear to have come from a distance; the time was well understood, and had been the same for many years. No evil resulted from the omission, if there was any; no fraud was imputed, and all parties attended, and thereby admitted notice." *Rodebaugh v. Sanks*, 2 Watts, 9, merely holds that a section of the act of assembly of Pennsylvania, providing that marriages shall be solemnized before twelve witnesses, etc., is merely directory, and the pregnant reason is given by Chief Justice Gibson, "that if it were held to affect the contract, the effect would be to bastardize a vast majority of the children which have been born within the state for half a century."

The last case cited is that of the *People v. Cowles*, reported in 13 N. Y. 350, and is really the only one cited by the appellant (except one in our own state to which we will presently refer) which seems to bear with any directness upon the precise question before us. This case, therefore, will justify a more detailed examination than we have given the others. The question came before the court of appeals of New York on this state of facts: Robert H. Morris was elected judge of the supreme court of New York for eight years, from the first of January, 1853; on the twenty-third of October, 1855, he died. A general election of judges was held on the sixth of November, 1855. No notice was given by the secretary of state of this election to fill the vacancy in Judge Morris's term—the laws of New York requiring that officer to give the notice; but the death of Morris occurred after notices given of the other elections, and after the time given for making such notification. At the election, the relator was elected. The governor, however, not regarding the election of relator, ap-

pointed defendant to the office. The supreme court of New York, at special term, decided in favor of the defendant; and afterwards, at a general term, modifying the judgment in an unimportant particular, confirmed the judgment of the special term. The case was carried to the court of appeals, and that court, by a majority—five to three—reversed the judgment. The opinion in the case of *People v. Cowles*, 13 N. Y. 350, was delivered by Johnson, J., and Denio, Comstock, Selden, and Hubbard, JJ., concurred. Mr. Justice Wright delivered a dissenting opinion, in which justices Mitchell and Johnson concurred. The stress of the opinion of the majority was on the peculiar features of the constitution of the state; from which they deduced the opinion, by a process of reasoning which is almost impossible for us to comprehend, that when the office of a justice of the supreme court becomes vacant before the expiration of his term of office the vacancy is to be supplied by the electors of the judicial district in which it exists, at the next general election of judges, although the vacancy occur at so late a day that no notice is or can be given by the secretary of state or other officer, pursuant to the statute, that a justice is to be elected to fill the vacancy; and that when the incumbent, whose term of office would not have expired for several years, died on the twenty-third of October, and the electors of the district at the general election of judges, on the ensuing sixth of November, elected a person to fill the vacancy, such election was valid, notwithstanding no notice was given by the secretary of state that a justice was to be elected to fill the vacancy at the election.

It will be seen, by a careful perusal of the opinion, that this conclusion was induced by the peculiar structure of the constitution of New York; and that it was not necessary to decide whether, in an ordinary case a vacancy occurring before the time of giving notice by the secretary of state, as required by the statute, a failure to give such notice would affect the validity of the election. But even if this judgment were otherwise fully in point, it is stripped of much, if not the whole, of its authority by the fact that it is, at best, but the judgment of five judges against three of the same tribunal, those three supported by a contrary ruling of the supreme court at a special term, and sustained substantially by the supreme court at a general term, after the subject had been thoroughly discussed and maturely considered. But as to the particular point in this case, the decision, if it be for the relator here, is mere *obiter*, and is not even noticed in the report of the case as a point decided. The

dissenting opinion of Mr. Justice Wright on the point involved expresses so forcibly our conclusions, that we insert it as expressive of our own views: "It is not contended by the relator that he has any right to the office, unless his interpretation of the thirteenth section be the correct one. He reposes himself upon the ground that the constitution contains a positive direction as to the times when vacancies shall be filled, and that it would be an infringement of the instrument to restrict the right of the elector, by legislative enactment, to a particular kind of vacancies, viz., such as had occurred twenty days before, or of which the secretary of state and other officers of the government have actually notified the people. He takes the unqualified position that the section is a restriction upon legislative authority, and that no statute can be enacted which shall interfere with the constitutional privilege or right of the elector, when a vacancy occurs prior to the day fixed for voting for judges throughout the state, to cast his ballot for a person to fill the vacancy. By his construction, the election to fill the vacancy is one held, not pursuant to any statute, but an unregulated assemblage of the electors under a constitutional provision. It is urged that it is not strictly correct to say that the election to fill the vacancy is held under the constitution, as the legislature provides the machinery, and the constitution only fixes the time. But is it true that anything is provided by statute? A popular election is being held for the choice of other officers, regulated and conducted according to law, but not to fill a vacancy in the judicial office. The elector may embrace the occasion to deposit his ballot, designating a person to fill a vacancy, but not under any statutory provision. He acts, not pursuant to law, but the constitution. Thus, to sustain the relator's position, we are driven to assume that the term 'election,' as used in the constitution, means something else than an assembling of the electors to vote under and in pursuance of statute authority; and that a valid election may be held independent of, and indeed in restraint of, legislative regulation. That all the elector has to do is to deposit his ballot at the time fixed for a 'general election of judges,' even though there be no statute regulation, or no authority by law, and the 'election' contemplated by the constitution is complete.

"In this case it is not pretended that the election was held under any statute. No notice was given that a vacancy existed, or that the electors were required to fill it. No provision was made by law for receiving or canvassing the votes cast to fill a

vacancy in the judicial office, or for ascertaining the fact whether there had been any choice. Before the votes were canvassed, the relator took the constitutional oath, and claimed to be entitled to the office, which he might well do if the 'election' was one unregulated by law and valid by the simple force of a constitutional provision. I had supposed that it was a proposition not to be controverted that it is by virtue of statutes alone that all valid elections are held. It has never before been pretended that a person could make title to an office through the popular vote, unless such vote was cast in pursuance of legislative regulation and authority. All the efficacy given to the act of casting a ballot is derived from the law-making power and through legal enactments; and indeed, the legislature must provide for and regulate the conduct of an election, or there can be none. The convention found the subject of popular election instituted and regulated by law, and the framers of the constitution are to be understood as speaking of and referring to such an entity as then existed, or might afterwards exist, by force of statute regulation. It is not to be assumed that the 'general election of judges' mentioned in the thirteenth section is not that authorized by law, and held under and in pursuance of legislative enactments, but a meeting of the people to vote under the organic law itself; and without such assumption, the right of the relator has no foundation. His argument is that the constitution appoints the time for the people to meet and vote, and all that is required to constitute a valid election, within the meaning of the thirteenth section of the judiciary article, is for the electors to cast their ballots. Nay, further, that any statute regulation practically preventing the filling of a vacancy at the time designated in the constitution is absolutely void. Though the convention of 1846 may have been justly charged with legislating rather than erecting the framework of government, I may be allowed to repel the imputation (having been myself a member of that convention) that they so far mistook the nature and purposes of a written constitution as to suppose that it might or could contain within itself the elements of active enforcement. They meant by the term 'election' that institution created and existing by operation of law, and that alone, and which, without the exercise of legislative power, could have no efficiency. The relator must make title under and in pursuance of a statute, or not at all. He must have received a plurality of votes at an election held pursuant to law, or he has no title or claim to the office.

It was at such an election the constitution provided that vacancies should be filled, and at none other.

"But let it be conceded that the constitution only fixes the time, and all other essentials to constitute an election, except giving notice, are left to be prescribed by the legislature, and that it has the power, and the obligation rests on it, to provide for conducting the election; still, would this be a valid election? It is to be observed that by fixing the time the legislature are virtually restricted from declaring that it shall be an essential requisite to a valid election; that the electors shall have official notice that a vacancy exists. Nothing is left to the law-making power but to provide for receiving the ballots, canvassing the vote, and declaring the result. Is not notice to the electors that a vacancy exists, and is to be filled, an essential characteristic, independent of any statute requirement, to a valid election? I think that it is.

"Notice to the electors lies at the foundation of any popular elective system. The elector cannot act through the ballot without notice that a vacancy exists to be filled. Necessity and sound policy demand that every elector shall have both the knowledge and the opportunity to enable him to exercise the elective right deliberately and intelligently. In our elective system the duty of giving notice is devolved upon the secretary of state. The legislature has wisely provided that the notice shall be given by this officer within a time and in a way calculated to give the fullest notice to the electors. It may be that under this statute regulation the omission to give the required notice of an election of a judge for a regular term would or ought not to vitiate the election. The elector should be presumed to know the law, and consequently at what period the regular term of the public officers to be voted for will expire, and be prepared to act accordingly. But there can be no such presumption when the election is to fill a vacancy. I believe that no case can be found holding that notice to the electors of the existence of a vacancy, and calling on them to fill it, is not essential to give validity to the meeting of the electoral body to discharge the special duty. Certainly it could rest on no principle or sound rule of governmental policy. In the nature of things, notice to the elector that a vacancy exists, and calling on him to fill it, is an essential characteristic of a popular election; and public policy and safety require that it should be given in such form as to reach every elector who has the duty to discharge. Notice, therefore, being an essential element of an election to fill a vacancy, whether we

regard the election at which the relator claims to have received a plurality of votes held in pursuance of the constitution or the law, it was equally invalid."

The case of *People v. Brenham*, 3 Cal. 477, is the authority chiefly relied on by the relator. It is not necessary to assail that case; for, as we shall show, the principle there announced does not militate against the respondent. But it is proper to remark that the force of this case is somewhat shaken by the fact that it was decided by a divided bench, and that the two judges who concurred in the judgment agreed to it upon different grounds. It is not easy to support that decision, even limited and qualified as it has been in the subsequent case of *People v. Porter*, 6 Cal. 26. The able argument of the respondent's counsel suggests, to say the least, some doubts of the correctness of the principles there laid down. But the utmost extent to which the court go in that case is to hold that no proclamation or notice is necessary to give validity to an election when the term is fixed by law, and expires by limitation at a given period, and the office is to be filled by statute at the time prescribed by law. In such cases it is held, as seems to be conceded by Mr. Justice Wright, in the case before cited, of *People v. Cowles*, 13 N. Y. 350, that the people are charged with the knowledge of the law, and must be held to act in accordance with that knowledge. In such case the election must be held in any event, and it is not in any way dependent upon any extrinsic or contingent event. Though, as will be seen, we do not approve of much of the reasoning from which our predecessors deduced this conclusion, as we shall have occasion hereafter to explain, yet we do not here question the propriety of that judgment upon the facts stated. In *People v. Porter*, 6 Cal. 26, this same general doctrine came under review. That was the case of an election by the people of a judge of the county court, to fill a vacancy occurring by the resignation of the previous incumbent. No proclamation was made by the governor. The governor appointed Mr. Porter after this election. The present chief justice delivered the opinion, and after stating the facts, says: "This being the case, was the election of Mr. Leake, which occurred on the fifth of September, legal? The law provides that vacancies in certain offices shall be filled by election at the next general election after the vacancy occurs. To render such election valid, it is necessary that it shall be conducted in the manner prescribed by law. The law requires that the governor shall make proclamation for thirty days prior

to each general election, designating the offices to be filled at such election. The supervisors of each county are required to give notice for at least ten days, by posting a copy of such proclamation at each place of holding the election in the county, and inserting the same in a newspaper, if one be published in the county: See Stats. 1855, p. 160.

"No such notice was or could have been given in this case, there not being thirty days intervening between the date of the letter of resignation and the day of election. The order published by the supervisors of said county, being without authority of law, was a nullity. It is contended that the statute requiring proclamation to be made of the offices to be filled is merely directory, and that a failure to give such notice will not vitiate an election. The case of *People v. Brenham*, 3 Cal. 491, is cited in support of this doctrine.

"The opinion in that case does not go to the extent claimed by counsel, and is not applicable to the case under consideration. I understand the decision to apply only to general elections, or elections to fill vacancies occasioned by the operation of law. The question involved was the validity of an election held under the charter of the city of San Francisco, to fill vacancies occasioned, not by resignation, but by reason of the expiration of the term for which the incumbents were elected. The court properly held that the failure of the incumbent to give the required notice could not deprive the people of their right under the law to elect their officers. But it has nowhere been decided that such notice is not essential to the validity of all special elections. An election to fill a vacancy occasioned by death or resignation of an officer is a special election, and the provision of our laws, which requires such elections to be held at the same time and place with general elections, does not change their character.

"It is essential to the proper exercise of the elective franchise that the voters should be informed of the officers in which vacancies have occurred, before each general election, in order that they may select fit and proper persons to perform the duties of such office.

"The law gives notice of those offices which are vacant by reason of the expiration of the term of the incumbent. The law also provides that the governor of the state shall, by proclamation, give notice of such vacancies as are occasioned by death, resignation, or removal from office; and without this notice, elections to fill such vacancies are invalid."

reasons expressed in the case of Brenham. The inference would seem to be that he considered the doctrine of Porter's case as conflicting with that of Brenham's.

It is difficult to see the distinction in principle between this last case and that at bar. If Monson had not resigned, he would have been entitled to hold for this short term—that is, for the period intervening between the election and January, 1859. This period, indeed, was a portion of his term of six years, commencing from January 1, 1853. There was, then, a vacancy for this period. This vacancy did not exist by operation of law, in the sense in which those words are used by the court in the extracts just given. And therefore, within the doctrine of that case, it was necessary for the public notice required by the statute to be given. The argument that as Botts was appointed to fill Monson's place, and as by the constitution Botts's appointment could last only until the election, the vacancy left in the balance of the term, by operation of law, cannot be upheld. In the first place, it cannot be assumed that all the voters of the country necessarily knew that Monson had resigned and Botts had been appointed to succeed him. Even if the knowledge of the fact could be assumed in this particular case, it would make but little for the argument, for we are now discussing, not an isolated case, but the general principle. The law acts by general rules, not by exceptional or particular instances, and whatever may be the merits or demerits of the given case, they must yield to the rule which is to govern all cases arising under the law. Thus the very rule invoked here is, that the people are presumed to know the law, and that it required an election to be held for this term in September, when it is quite evident that the people knew no such thing. But still we must give effect to such general principles of presumption, against our very strong assurance, that in particular instances they were not true as matter of fact. The very reason why a proclamation is ordered to be made is because it is supposed that the people would not otherwise know the fact proclaimed. We cannot presume, as matter of law, that they did know; still less can we presume they knew that an election was legal and proper in the face of the governor's proclamation, which impliedly asserted the contrary, by giving notice that an election would be held to fill many offices, among which this was not. And the facts in the record go to show that the people generally did not so understand or believe.

We have thus reviewed the authorities cited, and they certainly fail to show that the position of the relator is sustained by any authority directly to the point, and of controlling weight. And we are entitled to conclude, from the ability and research of the counsel, that they have not been cited because none such exist. We have examined with care the authorities within our reach, and have not been more successful than the learned counsel. We think, however, that the examination we have made shows the truth of Mr. Justice Wright's observations, that no authority can be found which authentically holds (for the doctrine of *People v. Cowles*, 13 N. Y. 350, is mere *obiter*) that an election held without notice, to fill a vacancy, is valid. The case of *People v. Porter*, *supra*, is the other way; and while the following cases do not expressly hold that the notice is essential, yet they evidently go, more or less directly, upon the idea that it is: *Cavis v. Robertson*, 9 N. H. 524; *Northwood v. Barrington*, Id. 369; *People v. Whiteside*, 23 Wend. 9; *Gilmore v. Holt*, 4 Pick. 257; see also *Hobbs v. Getchell*, 8 Greenl. 187; *Tucker v. Aiken*, 7 N. H. 113. While the principle which establishes the line of discrimination between acts directory and acts indispensable clearly indicates the correctness of the rule we have adopted—a rule supported by the clear and cogent reasoning of Mr. Justice Wright, and those associates who agreed with him in the case of *Cowles*. Nor do we, as before intimated, see the force of the reasoning urged in favor of the contrary view. The argument *ab inconvenienti* is far from the most logical and satisfactory. It is easily answered, too, by corresponding evils on the other side of the proposition.

It is true, the governor may prolong or increase his power by failing to make the proclamation. But this cannot be expected in these cases of vacancy, nor indeed in any cases. It is not to be supposed that the executive will prove derelict to his duty, especially for so small an object. The same argument would deny all but a scanty portion of his power. Under the pardoning power, he might, by a system of universal pardons, practically abrogate the whole criminal law; indeed, he might introduce general anarchy by refusing to execute the laws. The legislature may dissolve the government by refusing to levy taxes or to make appropriations, but these possible abuses of power are not reasons for refusing to give or acknowledge it. The evils on the other side are more probable of occurrence, and scarcely less injurious in character. If we hold to the principle that whenever a vacancy happens an election may be valid with-

This case may not afford an illustration, but others would. Where would be the limits of the principle?—for we must have some general rule. It would apply to districts of more than one county as well as smaller districts; to cases of vacancy in other offices as well as those of judges; and to judges of the supreme court as well as of districts and counties. If death or resignation happens the day before the election, and when the fact was unknown—possibly kept concealed by design—all that it would be necessary for a man to do would be to get a few votes—it matters not how few—and he could get the office, not only without but against the will of the great body of the people. The establishment of the principle would beget a laxity in the giving of this public notice of elections which might keep the people, in many instances, in ignorance of the offices to be filled at the various elections; and all this is to be done because of a legal presumption of “knowledge by the people of law and facts,” which every man knows is not always possessed even by the best informed, of which this case is itself a sufficient illustration. We cannot hold as nugatory a plain statutory enactment upon reasons so unsatisfactory. We think we have shown that the definition given by the authorities of directory acts, namely, those which are not of the substance of the thing provided for, has no application to this statute; that, on the contrary, the means, and only sure and efficient means, of bringing to the people authentic knowledge of their electoral rights and duties is of the very substance of the election at which they are to exercise them; and that, if we hold in cases of vacancies that the act requiring this proclamation which gives this intelligence is merely directory, and therefore to be followed or not at pleasure, we may, with the same propriety, set aside every provision of law regulating the time, place, and manner of elections. We should thus hold that an election may be independent of legislative control, protection, or regulation.

No censure is properly attributable to the executive department for its failure to insert this term in the proclamation; for the question as to the existence of this fraction of time as a period to be filled by popular election was a new and by no means a clear one; nor do we now decide that it did constitute such a term as to have called for this action.

This view being decisive of the relator's case, it is not necessary for us to pass upon the other questions raised in the case. Some of them arise in other cases before us, and will be dis-

posed of when those causes shall be determined. Nor is it necessary to consider by what title the incumbent holds the office in question. It is sufficient that the relator has no title to it.

The judgment of the twelfth district court is affirmed.

TERRY, C. J., concurred.

FIELD, J., dissented.

THE PRINCIPAL CASE IS CITED to the point that an election to fill a vacancy in an office caused by the resignation of the incumbent is a special election, and it is necessary that the governor should issue a proclamation calling for an election to fill the same before it can be validly filled, in *People v. Rosborough*, 14 Cal. 181; *People v. Martin*, 12 Id. 409; *Sawyer v. Haydon*, 1 Nev. 80; see also *People v. Wells*, 11 Cal. 329, approving the principal case.

BUTTE CANAL AND DITCH CO. v. VAUGHN.

[11 CALIFORNIA, 148.]

ONE WHO CONVEYS WATER BY MEANS OF ARTIFICIAL CANALS INTO NATURAL STREAM IN WHICH ANOTHER HAS WATER RIGHT by prior appropriation may afterwards divert an equal amount above the latter's dam, provided he does not injure his right.

PRIOR RIGHT TO USE OF NATURAL WATER OF STREAM does not entitle the owner of such a right to the exclusive use of the channel. So long as his water right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If such prior owner receives his full supply as prior to the use of the channel by others to carry water introduced therein, he has no cause for complaint.

BURDEN OF PROOF IS ON PARTY WHO CONVEYS WATER INTO STREAM ABOVE ANOTHER'S DAM, where the latter has a water right, and who wishes to divert such water before it reaches the dam, to show that he diverts no more than he conveyed into the stream. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

APPEAL from the district court of Amador county. The opinion states the facts.

W. W. Cope, for the appellant.

Robinson, Beatty, and Heacock, for the respondents.

By Court, FIELD, J. The plaintiffs claim, under the first appropriators, the right to the waters of the south fork of Jackson creek, in the county of Amador, and previous to and at the time of the diversion by the defendants, which is the occasion of this

suit, were the owners of a line of ditch and of flumes and aqueducts, into which, by means of a dam constructed across the stream, they diverted the waters from the natural channel of the fork, and conducted the same to adjacent mining ground to be used for mining purposes.

The defendants are the owners and in possession of valuable mining ground situated on the north side of the fork, and are endeavoring to obtain the requisite supply of water for its successful working from the north fork of the Mokelumne river and its tributaries, through the Amador county canal, under a contract with the owners of the canal. For that purpose the water is conducted from the canal by artificial channels to a natural gulch or ravine, from which it is emptied into the south fork of Jackson creek, above the dam of the plaintiffs. About a mile below the point where the water is thus emptied, the defendants have constructed a ditch leading to their mining ground, into which by means of a dam at its head thrown across the fork, they divert a portion of the waters flowing in the channel, and it is this diversion which is the subject of complaint in this suit. The quantity of water diverted does not equal the quantity emptied into the fork from the Amador county canal through the ravine or gulch designated. Upon these facts, the single question is presented, whether the defendants, after the mingling of the water conducted by them from the canal with the waters naturally flowing in the fork, possess the right to take out an equal or less quantity from the stream; or is the right of the defendants to the use of the water whilst in the ravine, or to the use of an equal quantity, lost by its subsequent mingling with natural waters of the fork?

This case is similar in its material features to that of *Hoffman v. Stone*, 7 Cal. 46. In that case the plaintiffs were the prior appropriators, and as such entitled to the waters of a stream called Dutch gulch, the channel of which was dry at certain seasons of the year. This channel the defendants used as a connecting link between two canals constructed by them, emptying their waters by one canal into the channel, and subsequently diverting them by means of a dam into the other. The plaintiffs in that case, who were the owners of a ditch which received its supply of water from the creek, obtained a judgment perpetually enjoining the defendants from diverting the water from the main channel so as to prevent it from flowing down to the extent of the capacity of their ditch. But on appeal the judgment was reversed, and this court, *per Murray, C. J.*, said:

"The plaintiffs being the prior locators, it would follow that any interference with the waters of Dutch gulch would be an infraction of their rights. But the appropriation of the waters did not give them the exclusive use of the bed of the stream. We see no reason why it might not be used by others as a channel for conducting water, so long as it did not interfere with their rights. If the defendants were diverting the natural water of the stream, as well as that brought into it by themselves, then the plaintiffs would have a just cause of complaint."

In the case at the bar the channel of the south fork of Jackson creek is used as a connecting link between the Amador county canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch. The principle difference between this case and that of *Hoffman v. Stone*, 7 Cal. 46, is the mingling of the water introduced by the defendants with the waters of the creek. In that case the channel of the stream was dry in certain seasons of the year, and at the time the suit was brought there was no natural water flowing in it. But it does not appear that this circumstance had any controlling influence upon the decision. The point settled in that case is this: that the prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If the plaintiffs in the present case receive their full supply, as previous to the introduction of water by the defendants, they have no cause of complaint.

It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity. Where there is a confusion of goods willfully made by one owner without the consent of the other, so that it becomes impossible to distinguish what belongs to each, the common law gives the entire property to the injured party. "But this rule," says Kent, "is carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. So if the corn or flour mixed together

were of equal value, then the injured party takes his given quantity, and not the whole:" 2 Kent's Com. 365; *Lupton v. White*, 15 Ven. 432.

The plaintiffs rely, with apparent confidence, upon the case of *Eddy v. Simpson*, 3 Cal. 249 [58 Am. Dec. 408]. In that case the plaintiffs were the prior appropriators of the water of Shady creek, having diverted the same by a dam across the stream. The defendants by like means obtained the water of Bloody run and Grizzly canyon, which they brought to a place known as Cherokee corral, where, after its use, it passed from their possession, and found its way, by natural channels and the natural level of the country, to Shady creek, at a point above the dam of the plaintiffs. And when the defendants undertook to retake from Shady creek a quantity of water equal to that which thus found its way into the channel, the court held their rights to the water were gone. "When the water of Grizzly canyon and Bloody run," said the court, "left the possession of the defendants at Cherokee corral, all right to and interest in that water was lost by the defendants. It might be made the property of whosoever chose to possess it. Without the agency of the defendants it found its way into Shady creek, joining the waters there in the possession of the plaintiffs, and became a part of the body of water used and possessed by them."

It is very evident that the court considered the fact that the water had passed from the possession of the defendants and found its way to Shady creek, without their agency, as material circumstances of the case; in other words, it regarded the water as having been abandoned. This is the view taken by Mr. Chief Justice Murray when he notices the objection that *Hoffman v. Stone*, 7 Cal. 46, was within the rule of that case; for the reason he assigns as an answer to the objection is the finding of the jury that the water was not abandoned by the defendants and left to find its way by natural channels into Dutch gulch, but was turned in by the defendants, making the gulch a connecting link of their ditch.

There may be some difficulty, in cases like the present, in determining with exactness the quantity of water which parties are entitled to divert. Similar difficulty exists in a case of a mixture of wheat and corn—the quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects because of the complicated and embarrassing character of the questions to which they give rise. If exact justice cannot be obtained, an

approximation to it must be sought, care being taken that no injury is done to the innocent party. The burden of proof rests with the party causing the mixture. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

Cases involving questions of analogous character and equal difficulty are of frequent occurrence. The illustration given by the defendants' counsel is in point. A constructs a ditch, and appropriates a portion of the water of some stream for mining purposes; B subsequently constructs a ditch for a similar purpose, tapping the stream. A then enlarges his ditch, destroying the landmarks of its original capacity. A dispute then arises between A and B as to whether A is not diverting more water through his enlarged ditch than he is entitled to by virtue of his first appropriation. Here the quantity of water to which A and B are respectively entitled becomes difficult of accurate adjustment; and if, instead of two, there be a greater number of ditches taking water from the same stream, questions respecting the conflicting rights of the parties become exceedingly complicated and embarrassing. The courts do not, however, as we have observed, refuse to entertain such questions; but endeavor to relieve them of their complication and embarrassment, and to mete out justice to all parties: *Priest v. Union Canal Co.*, 6 Cal. 170, and *White v. Todd's Valley Water Co.*, 8 Id. 443 [68 Am. Dec. 338]. In *Embrey v. Owen*, 4 Eng. L. & Eq. 470, Baron Alderson refers to a case in point. "There was a case," says the baron, "of *Dakin v. Cornish*, tried before me at Leeds, in 1845, where water was taken from the river Ayr to work a steam-engine. There was an artificial course from the river to a reservoir in the yard of a mill; the water was there mixed with other water obtained from the earth, the whole was then used for the steam-engine, what remained was transferred into another tube and carried back to the river; and the question was, whether this was an injury to some other mills lower down on the stream. We took much care about the case, and I left it to the jury to say if the same quantity of water continued to run in the river as if none of its water had ever entered the premises of the defendant, and if so, he was entitled to their verdict."

The first appropriator of the water of a stream passing through the public lands of this state has the right to insist that the water shall be subject to his use and enjoyment to the extent of

his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint.

It follows that the court below erred in sustaining the demurrer to the new matter set up in the answer, and the judgment rendered thereon must be reversed, and the cause remanded for further proceedings.

Ordered accordingly.

TERRY, C. J., and BALDWIN, J., concurred.

RIPARIAN RIGHTS.—The subject of riparian rights is discussed at great length in the note to *Heath v. Williams*, 43 Am. Dec. 269-283. The principal case is cited at pages 281 and 282 of this note, together with others holding a similar doctrine. The principal case is cited in *Loddell v. Simpson*, 2 Nev. 277, where the court discuss, generally, the doctrine of riparian rights arising from prior appropriation. The main point in the principal case is not adverted to.

JOHNSON v. JOHNSON.

[11 CALIFORNIA, 200.]

IN ACTION FOR PARTITION OF COMMUNITY PROPERTY, PARTIES HAVING BEEN DIVORCED, it appeared that the defendant was in possession of the lots sought to be partitioned, under a defective title, prior to his marriage with plaintiff, and that after marriage he purchased the lots with common funds, and took a warranty deed therefor: *Held*, that the lots were community property and should be divided, and that defendant having purchased the lots with common funds, and taken a warranty deed therefor, he was estopped to deny that he acquired a good title by the purchase.

APPEAL from the district court of Sacramento county. The opinion states the facts.

Crocker and Robinson, for the appellant.

C. Cole, for the respondent.

By Court, TERRY, C. J. This is an action for the partition of common property; the marriage contract between the parties having been dissolved by decree of a competent court.

It appears that at the time of the marriage, defendant was in

possession of certain lots to which he had no title, his claim being based upon a paper not under seal, purporting to transfer a mule and dray, and an "interest in the possession of the lots." After the marriage, defendant purchased the lots, taking a deed with covenants of warranty, the purchase money being paid from common funds. The premises were occupied as a homestead until the dissolution of the marriage.

The defense set up is, that the lots are the separate property of the defendant, owned by him before marriage; that the purchase of an adverse claim, which was a cloud upon his title, did not change the character of the property; and that plaintiff was only entitled to claim the moiety of the money expended in the purchase of the outstanding title.

The court below decreed the title purchased by the common fund to be common property, and directed defendant to convey to plaintiff one undivided one half of the interest acquired by the purchase.

The objection to this decree is, that it does not finally determine the rights of the parties.

The act defining the rights of husband and wife (Wood's Dig. 487) provides that "upon a dissolution of the marriage by the decree of any court of competent jurisdiction, the common property shall be equally divided between the parties."

We think it clear, from the testimony, that the lots in question were common property; defendant had no pretense of title before coverture, and having, with the common fund, purchased from another under a deed of warranty, he is estopped to deny, as far as plaintiff is concerned, that he acquired a good title by the purchase.

Judgment reversed, and case remanded, with directions that the court below proceed to make a division of the premises in question as the common property of the parties, and respondent recover costs.

FIELD and BALDWIN, JJ., concurred.

RITTER v. SCANNELL.

[11 CALIFORNIA, 238.]

OFFICER'S RETURN TO LEVY OF WRIT OF ATTACHMENT NEED NOT SET OUT ALL ACTS NECESSARY TO VALID LEVY. The general rule with regard to the execution of mesne process is, that all presumptions are in favor of the regularity of the acts of the officer, and that a return which simply states that the process was executed is sufficient *prima facie* to show a due and proper execution.

IT SEEMS THAT TITLE OF PURCHASER OF REAL ESTATE AT SHERIFF'S SALE DEPENDS upon the execution, levy, and sale, and cannot be affected by the return.

RETURN OF WRIT OF ATTACHMENT THAT IT HAD BEEN SERVED BY POSTING COPY THEREOF ON PREMISES is sufficient, without stating that they were at the time unoccupied.

LIEN OF ATTACHMENT UPON REAL ESTATE TAKES EFFECT IMMEDIATELY UPON LEVY THEREOF, and the deposit of a copy, with a description of the land attached, with the county recorder.

NOTICE—DEPOSIT IN RECORDER'S OFFICE OF COPY OF WRIT OF ATTACHMENT, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. Mortgage taken after such deposit is subject to this lien.

MISTAKE IN DATE OF RETURN OF WRIT OF ATTACHMENT MAY BE CORRECTED AT ANY TIME.

PROCEEDING to enjoin the sale of real estate under execution. The attachment in this case was levied on the premises November 13, 1854, and a copy thereof was deposited in the office of the county recorder on the same day. Indorsed upon this copy was a return by the sheriff, certifying that he had that day levied the writ upon all the right, title, and interest of the defendants therein in certain lands, which he proceeded to describe. The writ of attachment was filed in the clerk's office December 18, 1854. The return indorsed upon it was the same as that indorsed upon the copy in the recorder's office, except that it was dated October 30, 1854, and certified that it was served "by posting a copy of the within writ on the above-described land, and registering the same in the office of the county recorder." Plaintiff's title is based upon a mortgage executed and recorded on the ninth day of December, 1854, and the question in this case is whether the attachment was so levied as to create a valid lien prior to plaintiff's mortgage. The objections to the validity of the levy appear from the opinion.

Nathaniel Bennett and John Satterlee, for the appellants.

J. B. Hart, for the respondent.

By Court, **TERRY, C. J.** The objections to the validity of the attachment are: 1. That the return does not state with sufficient particularity the acts which constituted the levy; 2. That the return is contradicted in an important respect by the copy filed in the recorder's office.

Upon the first point, it is contended that every act which is, under the statute, requisite to the validity of an attachment of real estate, should be affirmatively shown by the return; and

that, inasmuch as it is shown in this case that the levy was made by posting a copy of the writ on the premises, the return should show that the premises were at the time unoccupied, in which case only could a valid levy be made in the manner stated.

Our statute prescribes the manner in which real estate may be attached, but contains no express provisions requiring that all the acts necessary to a valid levy shall be set out in the return, and we think the rule contended for was not contemplated by the legislature—that it is not warranted by the language of the statute or supported by authority. The general rule with regard to the execution of mesne process is, that all presumptions are in favor of the regularity of the acts of the officer, and that a return which simply states that the process was executed is sufficient, *prima facie*, to show a due and proper execution. See *Keithley v. Borum*, 2 How. (Miss.) 683; *Thompson v. Thompson*, Id. 737; *Smith v. Cohea*, 3 Id. 35.

The authorities cited by the respondent, *Williams v. Armory*, 14 Mass. 20, and 4 Phill. Ev. 804, in support of his construction, are decisions upon returns to executions under statutes authorizing the lands of the debtor to be appraised and delivered to the plaintiff at their appraised value in satisfaction of his judgment, and if not redeemed within a time limited, to vest absolutely in the judgment creditor. In such cases, as the return constitutes an important part of the party's title, the utmost particularity of statement is required, and a slight omission will vitiate the levy. But a very different rule obtains with regard to attachments. In *Taylor v. Minter*, 11 Pick. 348, the supreme court of Massachusetts says: "There is a manifest distinction in principle between a process which divests the title of the debtor, and transfers his property against his will, and one which merely creates a lien."

In other states, where a sale under execution is required to divest the title of the debtor, a different rule has been established; and it has been held that the title of a purchaser at sheriff's sale depends upon the execution, levy, and sale, and cannot be affected by the return. In *Jackson v. Sternbergh*, 1 Johns. Cas. 153, the court says: "But the sheriff's return, in my opinion, was not essential to the title of the purchaser; that title was not created by or dependent on the return, but was derived from the previous sale made by the sheriff by virtue of his writ. . . . The sale and the sheriff's deed are sufficient evidence of the title; and if the purchaser can show that the

sheriff had authority to sell, it is enough, and he need look no further."

The case of *Mitchell's Lessee v. Lips*, 8 Yerg. 179 [29 Am. Dec. 116], is to the same effect. In the case of *Wheaton v. Sexton*, 4 Wheat. 508, plaintiff claimed title as a purchaser at a sale under an execution which had never been returned, the sale having taken place after the return day of the writ. The court instructs the jury that if "the writ *fi. fa.* was levied by the marshal upon the property in question before the return day of the writ, it was lawful for him to sell the same under and by virtue of said writ, and that the facts respecting said sale might be proven by parol." An exception was taken by defendants to this instruction, and upon appeal, the supreme court of the United States said in reference to it: "The court below was unquestionably right in the instruction. The purchaser depends on the judgment, the levy, and the deed; all other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return day, whether he makes a correct return, or any return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return day."

It seems to follow from these authorities that the lien of the attaching creditor took effect immediately upon the levy of the attachment, and the deposit of the copy, with a description of the land attached, with the county recorder, and that it could not be divested by the failure of the sheriff to make a proper return; and if we admit that the return is not *prima facie* evidence of a proper levy, that the defendant should have been permitted to prove the fact by other competent evidence. The statute does not make the officer's return conclusive, or the only evidence of the manner of executing process; and in a case like the present we see no reason why the facts may not be shown by other competent evidence, especially as it is not attempted to contradict the return.

The deposit in the recorder's office of a copy of the writ, with a description of the property attached, was sufficient to operate as notice of the lien to third parties. The plaintiff's mortgage was taken with this notice, and as it was executed before the sheriff returned the process, he cannot be said to have been misled, to his prejudice, by the return.

The objection that the return is contradicted by the indorsement on the copy of the writ filed with the recorder is not tenable. The only discrepancy is in the date of the return, and it

has been often held that a mistake in the date may be corrected at any time: Drake on Attachments, secs. 215, 217.

Judgment of the court below reversed, and a new trial ordered.

BALDWIN, J., concurred.

RETURN TO LEVY OF WRIT OF ATTACHMENT.—The Texas law does not require a return to embrace all the proceedings of the sheriff, or that it shall be recorded in the registry of deeds, or that it shall constitute record evidence of the purchaser's title: *Howard v. North*, 51 Am. Dec. 769. The validity of a purchaser's title does not depend upon the return to an execution: *Ingram v. Belk*, 47 Id. 591, and note. It depends upon the fact of there having been a seizure and sale, and therefore if the return does not show the existence of these facts, they may be shown by evidence *aliunde*: *Byrr v. Einyre*, 41 Id. 410. An execution purchaser's title depends on judgment, levy, and deed, and other questions are between the parties to the judgment and the officer: *Brooks v. Rooney*, 56 Id. 430; see Drake on Attachments, sec. 204, note. Return to writ of attachment generally: See *Chadburne v. Sumner*, 41 Id. 720; *Nichols v. Patton*, 36 Id. 713; *Banister v. Higginson*, 32 Id. 134; *Gilman v. Thompson*, 34 Id. 714; *Cody v. Quinn*, 44 Id. 75; *State v. Lawson*, 47 Id. 728.

AMENDMENT OF RETURN: See *Fairfield v. Paine*, 41 Am. Dec. 357; *Paul v. Slason*, 54 Id. 75; *Woodward v. Harbin*, 37 Id. 753; *Chase v. Merrimack Bank*, 21 Id. 163; *Banister v. Higginson*, 32 Id. 134.

THE PRINCIPAL CASE IS CITED in *O'Connor v. Blake*, 29 Cal. 313, where the court hold that where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession.

BOURS v. ZACHARIAH.

[11 CALIFORNIA, 281.]

NOTARY PUBLIC HAS NO POWER, AFTER HE HAS TAKEN ACKNOWLEDGMENT OF MARRIED WOMAN, made his certificate on the deed, and after the deed has been recorded, to amend his former certificate, or to file a new one stating that he had examined such married woman separate and apart from her husband.

CERTIFICATE OF NOTARY PUBLIC IS NOT ACT IN PARS which may be made, by virtue of his office, at any time during his term of office. The taking of the acknowledgment and the making of the certificate constitute but one transaction, and this being done, the notary's powers are exhausted.

APPEAL from the district court of San Joaquin county. The opinion states the facts.

A. C. Baine, for the appellants.

Thomas Sunderland, for the respondents.

By Court, BALDWIN, J. This controversy involves a lot of land claimed as a homestead by the wife, and the validity of which claim rests upon a single question raised by a single fact. The question is as to the power of a notary public, who has taken the acknowledgment of the wife to a deed for land, made a certificate on the deed, and after the deed and certificate have passed from him and been recorded, to make and record a new certificate of acknowledgment—the first being fatally defective. The fact in connection with this principle is, that defendants, Zachariah and wife, made a paper, in form a mortgage, on a lot in Stockton, the homestead of these parties, to secure a debt due by Zachariah to the plaintiff below. This paper purports to have been acknowledged by the female defendant before one Weir, a notary public, about the time of its date; and a certificate of her acknowledgment is indorsed by the officer on the deed. But this certificate omits to state the fact that the wife was examined separately and apart from her husband and out of his hearing, and further, that in such examination she acknowledged that she executed the same freely and voluntarily, without fear or compulsion, or under undue influence of her husband, and that she did not wish to retract the execution of the same. Some six months afterwards a new certificate was made by the officer, and recorded.

It is not necessary to go into a review of the long list of cases which, in this state and elsewhere, hold the necessity of a compliance with all the substantial requirements of the act regulating the manner of conveyances by married women, in order to give validity to such acts. The law, knowing the necessity of strictly guarding the wife from the influence of the husband, as indispensable to the existence of such a thing as a separate estate or a right of property in her, has, by a uniform and consistent policy, thrown safeguards around the acts of disposition of such estate, and exacted a strict respect to them. Our statute is explicit in this regard. The wife is protected from the influence of the husband, and secured in the enjoyment of the freedom of her will, by the provision that she is to be examined by the officer apart from her husband, and that the officer shall state this fact in his certificate.

It is contended, however, that this certificate may, when completed and recorded, and after it has left the hands of the officer, be altered or amended, or an entirely new certificate be made, and this, we presume—for we see no limitation to the principle—at any distance of time, at least, so long as he con-

tinues in office. The statute seems to contemplate but one certificate. It speaks of but one. That certificate is evidence for certain purposes; but what would be the effect if several certificates were allowed, some qualifying or contradicting the rest, might not be so easy to determine. If two could be given, why not a dozen? If within six months, why not within six years? If the certificate amendatory of the former, why not in contradiction of it—denying all acknowledgment of the deed? If in respect to one class of deeds, why not to all? And what would this lead to, but the putting all land titles in the power of unscrupulous notaries, or leaving them to the mercy of their memories? These certainly are serious questions. We should have some very strong reasons or weighty authorities to sustain a proposition out of which such results may grow. We have been furnished with only two cases which seem to approach the principle contended for by the appellants. This itself is no inconsiderable argument against the pretension. Very many controversies have grown out of the alleged defective acknowledgments, and most of these have been, perhaps, in consequence of misprision or fault of the notaries or other officers certifying. Some of these have been hard cases upon purchasers. The rights of the wife have often, indeed, in most of the cases, been recognized and maintained. If the sense of the profession and the bench had not been decidedly against the power of the officer to amend the certificate, it is very strange that the attempt had not been made to amend it; especially, as will be shown hereafter, as it has been frequently attempted to prove the facts omitted by parol; and that, too, by the evidence of the notary. By how much speedier a process could all this have been effected, if a notary's certificate could at once have been amended, or a new one made out.

The ground upon which the power in question is rested is, that the certificate of a notary is an act *in pais*, which he may exercise by virtue of his office, and at any time while in office; and that the amending of his acts is in pursuance of the same general authority which enables him to do them. But we think this is not correct. A notary derives his power from the statute over these subjects. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is, in other words, acting as under a special commission for that case—clothed with a limited statutory power. He is to take the acknowledgment, and certify it as parts of the same.

transaction. After taking the acknowledgment, and making and delivering the return, his functions cease, and he is discharged from all further authority. He has exhausted his whole power over the subject as much as a special commissioner created for a particular purpose after the adjournment; or a court after the lapse of the term. If we were to look to analogies, we see nothing which upholds this pretension. If, as in some of the states, particular officers clothed with authority to take depositions, return them to court, it would scarcely be contended they had the power, months afterwards, to amend them, or to make return of new facts not appearing on the return when they closed the commission; nor could any other officer, except by virtue of some statutory power, after he had made return of his proceedings; nor officers charged with special inquiries.

Elwood v. Klock, 13 Barb. 50, is a case not dissimilar to this, both in the facts and principles involved. Mrs. Elwood executed a quitclaim of the premises in dispute, but the acknowledgment was defective in the same respect as this mortgage. On the trial below, the defendant offered the commissioner to prove—and he did—that he took the acknowledgment of Mrs. Elwood, and that the same was done in compliance with the provisions of the statute. The admissibility of this proof was the matter before the court on appeal. The court reviews the statutes of New York on this subject, and shows the various changes made in them. By the act of 1771, it was provided that no estate of a *feme covert* should pass by her deed without a previous acknowledgment, made by her apart from her husband, and a certificate thereof purporting that she had been examined privately, indorsed on the deed, and signed by the officer, etc. The same provision was re-enacted in 1788, in 1801, and 1813. The court says that in the revision of the laws in 1830 the same provision was substantially re-enacted. That statute is given, which is almost identically the same as ours. It provides that no estate of a married woman shall pass by any conveyance not acknowledged as required by the act; and that the officer who shall take acknowledgments shall indorse a certificate thereof, signed by himself, on the conveyance; and in such certificate shall set forth the matters therein required to be done. The court then proceeds: "The statute still looks to the certificate as containing the evidence that its requirements have been complied with, to enable the deed to become operative. The execution of a deed by one not under disabilities

may operate to pass an estate, without an acknowledgment, and the execution may be proved by any competent evidence. Not so of a deed of a *feme covert*. No estate passes except the conveyance is acknowledged as required by law. The disabilities of the wife are only removed by a strict compliance with the statute. As no deed can be recorded except upon a proper certificate of acknowledgment, a deed of a *feme covert* cannot take effect for any purpose except upon a like certificate. A deed cannot be recorded upon parol proof of its proper acknowledgment; neither can the estate of a married woman pass by parol evidence of an acknowledgment of the execution. If the acknowledgment can be established by the examination of the officer as a witness, years after the transaction, it may be established by the testimony of any other credible witnesses who may have knowledge of it, and perhaps by the admission of the wife herself to a third person, that the requirements of the statute had been complied with; thus substituting parol evidence, or verbal admission, for the solemn and formal written evidence required by statute. There is no evidence that the revisors or the legislature designed to change the effect of the former statutes upon this subject. The change in the language does not necessarily imply a change in the statute revised: *Crowell v. Crane*, 7 Barb. 191, and cases cited at page 195. I think that a conveyance of a married woman can only become operative upon her private examination before a proper officer, duly certified by him, and that it cannot be established by parol."

If the certificate be mere matter *in pais*, it is hard to see why parol evidence could not be admitted to amend or perfect it; or why, if the officer can be permitted to cure defects in it by his certificate, he should not by his affidavit, or by his testimony in open court.

The history of the law upon this subject throws light upon the question. At common law, a married woman could convey her property by fine, which was a feoffment of record; but then she was to be examined privately, whether she did it willingly and freely, or by compulsion of her husband. The record of the fine is evidence of the private examination of the married woman, and cannot be contradicted; for that were to lessen the credit of the judgments of the courts of justice, which is the highest evidence of the law: Bac. Abr., tit. Fines and Recoveries, C. In some of the states—Virginia and Kentucky, for example—acknowledgments of married women were sometimes, perhaps are still, taken in open court and entered of record. In the United

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supervision over him in this respect. The appellants insisted that the order of the court could be disregarded, and that the amendment stood as the act of the clerk, having a right to amend his certificate on the back of the deed, and make a record of it. The court says: "Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of opinion he had not; we are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

"If a clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it.

"The doctrine that a clerk may at any time, without limitation, alter the record of the acknowledgment of a deed made in his office, would be in practice of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court."

This language is relied on by appellant as establishing the proposition that the mere taking of the acknowledgment is an act *in pais*, and subject to be amended by the officer. But the words of the text must be altered before such a construction can be given; for after the record by the clerk in Elliott's case was made, the power of amendment ceased; the certificate was insufficient to entitle the deed to record as to Mrs. Elliott; yet it was recorded, and after the record it was held the clerk's power over the subject ceased. Where is the difference between the clerk's power ceasing on his recording the deed and certificate and the notary's power ceasing after the recording by the clerk? The court means no more than this: that while the deed and acknowledgment are in possession of the clerk, and his office of properly certifying the acknowledgment and recording the papers unaccomplished, the matter was *in fieri*, and he might go

on at any time before he finished the business, to complete it, just as in this case if the notary had retained the papers, and had, in attempting to write the certificate, made a mistake, he might have rectified it at any time before he discharged himself of the business, or delivered the papers for record, or possibly before they had been recorded. But it is not intimated that after the papers had gone from his to another officer's possession and been delivered for record, or actually recorded, he still could control them. In such case, "by the exertion of his authority, the authority itself becomes exhausted." The whole reasoning of the court in the section quoted is direct to show that the notary could have no such authority; for all the evils which are so well stated would follow as well from permitting alteration of the record to be made by amendments of the notary as of the clerk. This singular result, too, would follow: under our statute, the clerk can take the acknowledgment as well as the notary. The notary may amend the certificate, and therefore the record, after the deed and certificate are recorded; but the clerk, by the direct language of the decision cited, could not. The decision in *Elliott v. Piercol*, 1 Pet. 339, therefore, only amounts to this: that the act is in pais until some decisive act is done showing that the officer has exercised his authority over the subject, such as recording the papers or the like; but after that, like other cases of special authority, the power once exercised is exhausted.

We do not deem it necessary to criticise the case of *Jordan v. Corey*, in 2 Ind. 385 [52 Am. Dec. 516]. That case we think wholly unsupported by authority. See also *Stanton v. Button*, 2 Conn. 527; *Pendleton v. Button*, 3 Id. 406; *Hayden v. Westcott*, 11 Id. 129; *Lessee of Watson v. Bailey*, 1 Binn. 470; *Jourdan v. Jourdan*, 9 Serg. & R. 270. In this last case it was attempted to supply the defect by the evidence of the magistrate taking the acknowledgment. But the court overruled the point, saying "there would be no certainty in land titles if this kind of evidence were admitted." But if the principle contended for be true, why not suggest to or permit the officer, while denying him permission to state the facts validating the deed on oath, to certify them to the court?

The fact that in some of the cases cited the statutes construed require the recording of the deed to give or complete the title does not make the cases less authoritative; for the reasoning of the judges does not rest upon this circumstance.

We decided at this term that the homestead must be conveyed

in the same manner as the separate estate of the wife, so far as the certificate of acknowledgment is concerned.

The judgment of the district court is affirmed.

FIELD, J., concurred.

THE QUESTION DECIDED IN THE PRINCIPAL CASE is discussed fully in the note to *Jordan v. Corey*, 52 Am. Dec. 519. See also note to *Livingston v. Kettelle*, 41 Id. 168.

HARDY v. HUNT.

[11 CALIFORNIA, 342.]

WHERE ONE GIVES MONEY TO ANOTHER TO BET UPON ELECTION, AND LATTER SO USES IT BY DEPOSITING IT WITH STAKE-HOLDER, this is an illegal act, but the party depositing it may retract his illegal act. The money is not forfeited for the benefit of the stake-holder, but he holds it as bailee of the depositor, who may resume it at any time before it is paid over to the winner.

STAKE-HOLDER.—WHERE PRINCIPAL PLACES HIS MONEY IN HANDS OF AGENT TO BET UPON ELECTION, and it is so used by the agent, who deposits it with a stake-holder, where it is attached by the creditors of the agent, and the stake-holder was cited to appear before the justice's court out of which the attachment issued, and knowing the facts, he stated them, whereupon a judgment was rendered that he pay the money over to the creditors, which he did, the principal may maintain an action against the stake-holder for the money, and the judgment of the justice's court is no protection to him, as he should have defended against the same in some manner, interpleaded, or appealed therefrom.

ESTOPPEL.—ONE WHO GIVES MONEY TO AGENT TO BET UPON ELECTION, IN AGENT'S NAME, is not estopped to deny that the money is the agent's when it has been attached as such in the hands of one with whom the agent has deposited it, by the agent's creditors.

PLAINTIFF, Hardy, gave O'Brien five hundred dollars to bet on the election for sheriff of Sacramento county, the bet to be made in O'Brien's name, without disclosing plaintiff's identity, but for his benefit. Accordingly O'Brien made the bet with one Harris, the terms of which were reduced to writing and signed by O'Brien and Harris, they appearing to be the only parties to it. In pursuance of the terms of the wager, O'Brien deposited the five hundred dollars with defendant, Hunt, who was to act as stake-holder in the matter. Before the election an attachment, issued out of a justice's court in pursuance of section 126 of the practice act, was served upon Hunt, at the suit of O'Brien's creditors. Harris then, with O'Brien's consent, withdrew his five hundred dollars from the stake-holder's hands, and O'Brien

plaintiff did not part with the ownership by allowing it to be used for his benefit, though in the name of another. It was to be used for this one purpose—not invested, or changed, or further dealt with. The money in the hands of the agent remained, as between him and the principal, the money of the principal. Upon the retraction of the wager, if not before, the right to its possession was in the plaintiff. This identical money was, it seems, deposited with the stake-holder. We cannot see why the plaintiff did not have a right of action for it—especially as O'Brien interposes no objections. And so are the authorities: *Vischer v. Yates*, 11 Johns. 29; *Yates v. Foot*, 12 Id. 10; *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Mason v. Waite*, 17 Mass. 560; *People v. Houghtaling*, 7 Cal. 348.

The judgment of the justice was no protection to Hunt. Hardy was not a party to the judgment. On the contrary, the justice refused to permit him to contest. Hunt, knowing the facts—if he is to be considered as a garnishee—should have set them up in some way, in resistance to the proceeding; if necessary, perhaps he might have filed an interpleader for his protection; or at least, appealed from this irregular and unauthorized judgment. In *Oldham v. Ledbetter*, 1 How. (Miss.) 47, the court of errors and appeals of Mississippi says: "The garnishee is regarded by the law somewhat in the light of a trustee, and is bound to protect, by legal and appropriate steps, the rights of all parties to the goods or credits attached in his hands; and if, after notice, though execution may have been awarded against him, he shall satisfy the judgment, it will be in his own wrong, and constitutes no valid defense to the claim of the assignee. This position is fully sustained by an authority in *Corsee v. Craig*, 1 Wash. 425; and in *Wise v. Hilton*, 4 Greenl. 435, it was held, etc. The decision in the case of *Prescott v. Hull*, 17 Johns. 290, is in accordance with these authorities." In this case it was held the garnishee should have protected himself by a bill of interpleader; and failing to make the defense, he was held liable. *Yarborough v. Thompson*, 3 Smed. & M. 291 [41 Am. Dec. 626], affirms the same general doctrine.

If it be contended that the title to this money passed by a levy of the attachment, the answer is, that if this could be under any circumstances, it did not in this instance, because the money was not the property of O'Brien.

On the whole case, we think the judgment should be affirmed.

FIELD, J., concurred.

ILLEGAL WAGER IS REVOCABLE AT ANY TIME BEFORE EVENT HAPPENS, and a revocation thereof entitles the parties to a return of their deposits: *Turleton v. Baker*, 44 Am. Dec. 358; *Hickerson v. Benson*, 40 Id. 115; see note to *Allen v. Dodd*, Id. 635.

STAKE-HOLDER OF MONEY WAGERED UPON RESULT OF ELECTION cannot pay over the money lawfully in opposition to the order of his principal, nor can he refuse to deliver up the wager if demanded before the determination of the final result of the election: *Jeffrey v. Ficklin*, 36 Am. Dec. 456. Actions against stakeholders generally, see *Dauterive v. Broussard*, 39 Id. 550; *Stacy v. Foss*, 36 Id. 755; *Bledsoe v. Thompson*, 57 Id. 777; *Shackleford v. Ward*, 36 Id. 435; *Bates v. Lancaster*, 51 Id. 696; *Mytinger v. Springer*, 38 Id. 774.

MONEY ADVANCED TO ANOTHER TO BE BET ON ELECTION, or to be used to violate the provisions of any public statute, cannot be recovered back, though never used by the receiver for the purpose for which it was sent: *Morgan v. Groff*, 49 Am. Dec. 273.

ESTOPPEL, WHEN ARISES BY SILENCE, CONCEALMENT, OR MISREPRESENTATION: See *Titus v. Morse*, 63 Am. Dec. 665, and cases in note.

THE PRINCIPAL CASE IS CITED with approval in *Walling v. Miller*, 15 Cal. 38, where the court say: "Upon the facts, we think the plaintiff entitled to recover—the payment to the officer after notice being no protection: See *Hardy v. Hunt* for the doctrine in such cases." The principal case is also cited in *Johnston v. Russell*, 37 Id. 670, wherein the general question of bets upon elections is discussed.

HARR V. BARKER.

[11 CALIFORNIA, 383.]

RULE THAT FACTOR CANNOT PLEDGE GOODS APPLIES ONLY TO TECHNICAL FACTORS, whose notorious duty is to sell goods of others consigned to them for that purpose, in California, affirming *Hutchinson v. Bours*, 6 Cal. 383.

WHERE ONE HAS LARGE NUMBER OF BARRELS OF FLOUR IN WAREHOUSE, AND SELLS ENTIRE QUANTITY TO SEVERAL SEPARATE PURCHASERS, giving to each his delivery order upon his warehouseman, if the purchasers all surrender their several orders to the warehouseman without making any separation, but voluntarily leave the flour standing on the books to the credit of each for his proper number of barrels, the delivery to each purchaser is complete. When each purchaser presented his order, he was entitled to a separation of his number of barrels from the mass, or not, at his election.

In December, 1853, Barker & Paddock purchased six thousand six hundred and forty-nine barrels of flour from a firm of dealers, which flour was at the time in the storehouse of Tilden & Little. This sale was negotiated through West, a broker, and it was understood that the sale was to be kept secret for business reasons. The flour was of two brands, Gallego and Hax-

all, and Barker & Paddock employed West to sell it for them. The flour still standing upon the warehousemen's books in the name of the former owners; they, from time to time, drew orders on Tilden & Little in favor of West for a large portion of the flour. They also drew an order in favor of Barker & Paddock for another large portion of the flour, and the latter indorsed this order over to West. West delivered these orders to Tilden & Little, and they credited him upon their books with the quantity of flour specified therein. In March, 1854, plaintiffs loaned West sums of money aggregating eleven thousand five hundred dollars, and received in pledge warehouse receipts upon Tilden & Little for one thousand five hundred and forty-four barrels of flour. These receipts were in favor of West, and plaintiffs surrendered them to Tilden & Little, and took from them in their own name two new receipts, one for three hundred and twenty-four barrels Haxall, and the other for one thousand two hundred and twenty barrels Gallego. These receipts were dated May 17, 1854. This was the practice between West and Tilden & Little: where the former made a sale of flour, the latter would either deliver it to the purchaser or transfer it to his account, and charge it to West. In addition to the flour pledged to plaintiffs by West, he sold them five hundred barrels of Gallego flour in September, 1854, "to be inspected superfine." Plaintiffs delivered the order for this flour to Tilden & Little, and they set over to their account four hundred and eighty barrels, this being all that remained in West's name. Plaintiffs were engaged in completing a separation and inspection of their flour at the time of the seizure by the sheriff, when defendants forbid them to proceed further. Plaintiffs now claimed the Haxall and Gallego flour as their own, but Tilden & Little refused to give it to them at defendants' command. The sheriff then took possession of the flour, at the suit of Barker & Paddock against Tilden & Little. At the trial it was shown to be customary in San Francisco for factors to store goods in their own name. It was also shown that during the years 1854-5 West occasionally bought and sold flour on his own account. The court instructed the jury "that plaintiffs had made out title to the property described in the complaint, to wit, one thousand three hundred and twenty barrels Gallego flour, and three hundred and twenty-four barrels Haxall flour, and that they were entitled to recover." Judgment for plaintiffs, and defendants appealed. This case was before the court once before: See *Horr v. Barker*, 8 Cal. 603.

Lake and Crittenden, for the appellants.

Shafers, and *Park and Heydenfeldt*, and *Hudson*, for the respondents.

By Court, BURNETT, J. The first point made by defendants is, that West, being only employed to sell, had no right to pledge, not even to persons ignorant of the fact that he was not the owner.

In the case of *Martini v. Coles*, 1 Mau. & Sel. 145, Lord Ellenborough said: "But it has been decided ever since the case of *Patterson v. Tush*, 2 Stra. 1178, that a factor cannot pledge. Perhaps it would have been as well if it had been originally decided that when it was equivocal whether a person was authorized to act as principal or a factor, a pledge made by such a person, free from any circumstances of fraud, was valid. But it is idle now to speculate on this subject, since a long series of cases has decided that a factor cannot pledge."

Le Blank, J., in the same case said: "Whether it might not originally have better answered the purposes of commerce to have considered a person in the situation of *Vos*, having the apparent symbol of property, as the true owner in respect to that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate; since it has been established by a series of decisions, that a factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being a factor."

Bayley, J., also said that "a factor has authority to sell, but not to pledge; and therefore a person who takes a pawn of a factor takes it at his peril. If the principal does anything to induce the person to believe the factor really the principal, that would be a different case. Cases may, perhaps, exist where a principal would be bound by a pledge made by his factor."

It is very evident that the judges thought the rule, as originally established, was a hard one; but they feel themselves constrained to adhere to a long series of decisions. The acts of 4 Geo. IV., c. 83, and of 6 Geo. IV., c. 94, were subsequently passed modifying this rule: *Phillip v. Huth*, 6 Mee. & W. 594, 596. A statute of similar import was passed in New York in 1830: 1 R. S., 2d ed., 762; *Warner v. Martin*, 11 How. 228.

In this state we have no statute upon this subject, and the harshness and injustice of the rule, as originally established in England under the views there taken of the commercial policy of that country (and which reasons are inapplicable to our con-

dition), induced this court, in the case of *Hutchinson v. Sours*, 6 Cal. 383, to confine the rule to a technical factor, "where his only business is to sell goods consigned to him for that purpose." We see no sufficient reason for deviating from the doctrine of that case.

The next point that requires examination is the objection that no title vested in the plaintiffs for want of segregation; the flour, being of different qualities, though all of the same brand, was placed in one pile by itself. In the former opinion we said: "The title to the entire lot had passed from West to the different purchasers, and the flour remained with Tilden & Little in the same state it would have been in had each purchaser first separated his number of barrels from the mass, and then they had all put them together afterwards."

We have examined the most important authorities referred to, and see no reason to change our former opinion. West had a certain number of barrels on store in one mass; and as he sold different portions of this mass to different purchasers, he drew a delivery order for each parcel. Those several orders were surrendered by the purchasers to the warehousemen, who credited each purchaser with the number of barrels to which he was entitled. This the parties had the right to do. There was nothing improper in this voluntary act. It was a matter of convenience to all. When each purchaser presented his delivery order from West, he was entitled to a separation of his number of barrels from the mass, or not, at his election. Each purchaser knew the exact condition of the flour, and each had the right to let his portion remain in the general mass. When West had drawn for the whole amount, and the last purchaser had surrendered his order, there was nothing further for West to do. The purchasers could not call on West to separate each portion from the mass, because each purchaser had voluntarily taken his portion in the mass. After surrendering their several orders, and taking a credit on the books of Tilden & Little, the purchasers had no further claim upon West. When A has six hundred barrels of flour on store, and he sells to B one hundred, to C two hundred, and to D three hundred, and gives each a delivery order upon his warehousemen, and the purchasers all surrender their several orders without making any separation, but voluntarily leave the flour standing on the books to the credit of each for his proper number, we confess we cannot see what further act A has to perform, or why there is not a complete delivery to each purchaser. If the purchasers choose to leave their flour

in the mass, and to trust to each other, it is their right to do so, and the seller has nothing further to do in the matter of delivery. The title has completely passed from the seller to the purchasers, respectively.

And the fact that the flour was of different qualities can make no difference under the circumstances of this case. The plaintiffs had possession of a certain number of barrels under the pledge, and a certain number under their purchase; they had voluntarily received the four hundred and eighty barrels without inspection. By this act they waived the inspection as a condition precedent to delivery. After having received the four hundred and eighty barrels, by having it placed to their credit on Tilden & Little's books, the plaintiffs could only look to West upon his covenant, that the flour should inspect superfine. Considering the dealings between West and the plaintiffs, they had the right to select the four hundred and eighty barrels from the whole mass received by them from West, so as to place all the bad flour among that which was pledged to them. This was what they were doing when they were forbidden by the defendants.

The reasoning of the supreme court of Ohio, in the case of *Woods v. McGee*, 7 Ohio, 467 [30 Am. Dec. 202], commenting upon the decision of the court of appeals of Virginia in the case of *Pleasants v. Pendleton*, 6 Rand. 473 [18 Am. Dec. 726], does not seem to us to be conclusive.

"It is impossible," says the court, "to answer the difficult inquiry, If a part only of the flour had been burned, in that case on whom would the loss have fallen? If A, being the owner of two thousand barrels of flour, sells one thousand to B, but without anything being done to ascertain the identity and individuality of the part sold, and one thousand barrels are consumed by fire, what is there to determine that one thousand are the property of the vendor, and that he shall bear the loss?"

It appears to us that the court sacrificed the common sense and justice of that case to the misapplication of a good principle, when confined to proper circumstances. Suppose A sells and delivers one thousand barrels to B, and five hundred to C, and that the two purchasers afterwards put their flour together in one mass, all being of the same brand, and without marks to distinguish one brand from another; in case of partial loss, upon whom would it fall? It would seem to be a very inadequate system of jurisprudence that could not give a solution to that question. The parties had a just right to do what they did do;

and common justice would say they should each bear the loss in proportion to his interest in the whole. And what possible difference can it make if one of the parties be the seller and the other the purchaser? In this latter case, as in the former, they are each the separate owner of a specified number of barrels. The seller has a thousand barrels in a warehouse in one mass, and sells to a purchaser a portion, and gives him a delivery order, which he presents and takes a warehouse receipt in his own name, leaving the flour in the mass. From the transaction, it is clear that it is the mutual agreement of the seller and purchaser that the property should remain together; for the plain reason that practical common sense will not dispute about the separate identity of two or more things that are all just alike. In all such cases we conceive it to be the duty of the courts to look to the intention of the parties. They are competent to contract, and they have a practical knowledge of the best method of carrying out their intentions; and the courts should give effect to such intentions when ascertained. If the parties considered it a delivery, it should be held to be such, as between them, or as between them and mere trespassers.

The next point which requires notice is the objection that the property in controversy, being parcel of a large quantity, could not be recovered in replevin.

If the views we have taken be correct, that the title had passed from West to the several purchasers, then there was nothing in the state of the pleadings that would warrant the defendants in raising this question. If we consider, for the sake of argument only, that the other owners should have been joined in the action, either as plaintiffs or defendants, this objection should have been set up in the answer.

The only remaining objection made by the learned counsel of defendants which it is necessary to notice is, that the property having been delivered to Barker & Paddock, by virtue of process issued in their previous action of replevin against Tilden & Little, it could not be replevied by the plaintiffs in this action. This objection, whether sufficient or otherwise, was not affirmatively set up in the answer, and the proof offered was properly rejected.

Judgment affirmed.

TERRY, C. J., concurred. _____

POWER OF FACTOR TO PLEDGE GOODS OF HIS PRINCIPAL consigned to him to sell is discussed in the note to *Bigelow v. Walker*, 58 Am. Dec. 163; see also *Bowie v. Napier*, 10 Id. 641; *Bott v. McCoy*, 56 Id. 223.

MEASURING AND SETTING APART GOODS are not essential to perfect sale, except when it is necessary in order to define the subject-matter: *Winslow v. Leonard*, 62 Am. Dec. 354. Where the owner of corn gave an order on the agent, at the depot where the corn was to arrive, to deliver six hundred and twenty-five bags to a person designated, and the agent recognized the person's right to the property, it was held that there was a constructive delivery: *Sahlman v. Mills*, 51 Id. 630. Where defendant bid off at auction a portion of a quantity of hay, it was held that to constitute a delivery of it, separation of the portion so bid off from the residue, and an offer and an acceptance by the buyer, were necessary: *Messer v. Woodman*, 53 Id. 241. Delivery of wood sold by the cord may be sufficient, though it has not been measured by the vendee: *Hunt v. Thurman*, 40 Id. 683; see a discussion of this question in *Brasier v. Ansley*, 51 Id. 408; *Eagle v. Eichelberger*, 31 Id. 449; and note to *Shindler v. Houston*, 49 Id. 330; *Golder v. Ogden*, 53 Id. 618.

THE PRINCIPAL CASE IS CITED in *McLaughlin v. Piatti*, 27 Cal. 451, where the court decide that a sale of a given number of cattle then running in a herd of a larger number is an executory contract, and does not apply to any particular cattle until the number sold have been separated from the herd. If goods are sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title remains in the seller until the bargained property is separated and identified. It is cited in *Ghirardelli v. McDermott*, 22 Id. 539, where the court hold that as between the parties to a sale of goods on store in a warehouse, the delivery of an order on the warehouseman for the goods, by the seller to the buyer, is a delivery, and passes the title to the latter so as to render him liable for the price. In *Wright v. Solomon*, 19 Id. 64, the court lay down the rule that a factor cannot pledge as security for his individual debt the goods of his principal consigned to him for sale. They extend this rule to all factors, and to that extent overrule the principal case.

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 7. **LONG SILENCE TO CONSTITUTE RATIFICATION OF UNAUTHORIZED ACT** is not confined to cases where the relation of principal and agent exists between the person doing the act and the person affected by it; such conduct is evidence of a ratification, more or less expressive according to the circumstances under which it takes place. *Id.*
 8. **RATIFICATION OF UNAUTHORIZED ACT OF STRANGER** may not be implied as a conclusion of law from the silence of the party affected by the act, but it does not follow that it is incompetent to be submitted to the jury; and it may, as a circumstance, with others, be submitted to the jury as facts from which they may imply such ratification. *Id.*
 9. **ASSIGNOR, BY REMAINING IN POSSESSION OF GOODS** to dispose of them as agent for the trustee, is deemed *prima facie* to have conducted himself in dealing with them in accordance with an understanding with his principal, who is bound to take notice of the manner in which the agent conducts himself in his employment, and who is presumed to have assented to his acts. *Linn v. Wright*, 282.
- See BAILMENTS**, 2; **ESTOPPEL**, 3, 8; **EXECUTORS AND ADMINISTRATORS**, 29; **FACTORS**; **FRAUDULENT CONVEYANCES**, 4; **GAMING**, 2, 3; **PLEADING AND PRACTICE**, 6-8; **VENDOR AND VENDEE**, 6.

ALTERATION OF INSTRUMENTS.

ALTERATION OF NOTE BY ERASURE OF PLACE OF PAYMENT, after delivery to the payee, is presumed to have been made by the payee, and unless the assent of the maker is proved, renders the note void. *White v. Hase*, 548.

See EXECUTIONS, 14; **MERGER**.

AMBIGUITIES.

See BOUNDARIES.

AMENDMENTS.

See MISDEMEANORS, 24; **JUDGMENTS**, 1; **NOTARIES**, 1; **PLEADING AND PRACTICE**, 5-8; **RECORDS**, 2-4.

ANIMALS.

1. OWNER OF DOG HAS SUCH PROPERTY IN HIM as will entitle him to maintain an action against any one for killing or injuring him. *Wheatley v. Harris*, 258.
2. SOUTH CAROLINA FENCE LAW REQUIRES CATTLE TO BE FENCED OUT, AND NOT IN. It is therefore not unlawful for the owner of horses to permit them to run at large over lands not guarded by such a fence as the law prescribes. *Murray v. S. C. R. R. Co.*, 219.
3. ENTRY OF HORSE UPON UNINCLOSED RAILROAD TRACK IS NO TRESPASS, and the owner thereof is not guilty of negligence in allowing him to be at large. *Id.*
4. OWNER RUNS RISK ONLY OF ACCIDENTAL INJURIES TO HORSE which he permits to run at large, and can recover for any injury thereto from the negligence of another. *Id.*

See EXECUTIONS, 5; RAILROADS, 2.

ANSWER.

See PLEADING AND PRACTICE, 9-17, 21.

APPELLATE COURTS.

See CRIMINAL LAW, 14; JURISDICTION, 1; MARRIAGE AND DIVORCE, 10; PLEADING AND PRACTICE, 20, 22, 23, 24, 33.

ARREST.

See CORPORATIONS, 6.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS THAT INCLUDES ONLY PART OF DEBTOR'S PROPERTY, and exacts from the creditors a release of the debtor, is fraudulent. *Gadsden v. Carson*, 207.
2. ASSIGNMENT BY PARTNER FOR BENEFIT OF CREDITORS that exacts a release of the firm, as well as of himself, is fraudulent. *Id.*
3. ASSIGNMENT PROVED TO HAVE BEEN INTENDED TO SECURE PREFERRED CREDITORS, and those who had incurred liability as sureties of the assignor, and also to secure to the assignor certain benefits out of the property to the hinderance of other creditors in the enforcement of their rights, is fraudulent and void as to the deferred creditors. *Linn v. Wright*, 282.

See PARTNERSHIP, 6.

ASSIGNMENTS OF CONTRACTS.

1. ANY CHOSE IN ACTION MAY BE ASSIGNED IN TEXAS, and suit brought thereon by an equitable holder. *Hopkins v. Upshur*, 375.
2. ORDER DRAWN ON PARTICULAR FUND, AFTER NOTICE TO DRAWEE, CONSTITUTES EQUITABLE ASSIGNMENT, and binds the fund, *pro tanto*, in the hands of the drawee. *Martin v. Maner*, 223.
3. DIRECTION BY CREDITOR FOR APPROPRIATION OF DEBT AND ASSENT OF DEBTOR is all that is necessary to constitute a legal transfer of the debt; and neither the omission nor neglect of the debtor to enter the transfer in his books could operate to defeat an arrangement dictated by his creditor and assented to by himself. *Id.*

See SUBSCRIPTION, 1; VENDOR AND VENDER, 1, 3, 18.

ASSUMPSIT.

See PAYMENT, 4.

ATTACHMENT.

1. ATTACHMENT CANNOT FASTEN ON FUNDS IN BANKERS' HANDS for which certificates of deposit have been issued. *McMillan v. Richards*, 655.
2. RETURN OF WRIT OF ATTACHMENT THAT IT HAD BEEN SERVED BY POSTING COPY THEREOF ON PREMISES is sufficient, without stating that they were at the time unoccupied. *Ritter v. Scannell*, 775.
3. LIEN OF ATTACHMENT UPON REAL ESTATE TAKES EFFECT IMMEDIATELY UPON LEVY THEREOF, and the deposit of a copy, with a description of the land attached, with the county recorder. *Id.*
4. NOTICE—DEPOSIT IN RECORDER'S OFFICE OF COPY OF WRIT OF ATTACHMENT, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. Mortgage taken after such deposit is subject to this lien. *Id.*
5. MISTAKE IN DATE OF RETURN OF WRIT OF ATTACHMENT MAY BE CORRECTED AT ANY TIME. *Id.*
6. OFFICER'S RETURN TO LEVY OF WRIT OF ATTACHMENT NEED NOT SET OUT ALL ACTS NECESSARY TO VALID LEVY. The general rule with regard to the execution of mesne process is, that all presumptions are in favor of the regularity of the acts of the officer, and that a return which simply states that the process was executed is sufficient *prima facie* to show a due and proper execution. *Id.*

See EXECUTIONS 37; PARTNERSHIP, 9.

ATTORNEY AND CLIENT.

See EXECUTORS AND ADMINISTRATORS, 34.

AUCTIONS.

1. SUBSTITUTION OF ONE NAME FOR ANOTHER ON AUCTIONEER'S LIST OF PURCHASERS cannot affect the validity of the sale. The orders directing and confirming it give it validity. *Halleck v. Guy*, 643.
2. PARTY HAVING INTEREST IN PROPERTY ABOUT TO BE SOLD AT AUCTION has right to have it offered for sale under such circumstances as afford an opportunity for fair competition amongst all who may be disposed to buy. Doubts about the identity or title of the property may prevent prudent men from bidding, and are therefore enough to justify any one charged with the duty of making a sale in postponing the sale until such doubts may be removed and the danger of sacrifice avoided. *Roberts v. Roberts*, 435.

See STATUTE OF FRAUDS, 2.

BAILMENTS.

1. PUBLIC MILLERS ARE HELD TO VERY GREAT DEGREE OF CARE AND DILIGENCE in safely preserving materials delivered to them to be ground; but their liability is not as extensive as is an innkeeper's or common carrier's. If in the exercise of such care as from the nature of the case is thought necessary for its preservation the grist is lost, without the imprudence, negligence, or fault of the miller, he will not be liable. This class of bailment is known as *locatio operis faciendi*. *Wallace v. Canaday*, 250.

2. MILLER'S LIABILITY FOR GRAIN DELIVERED TO HIM TO BE GROUND CONTINUES until it is so ground and returned to its owner. If the owner's servant is present while the grain is being ground, assisting in the work, and places a sack of the grist in a place from which it is stolen, the miller is not relieved from his liability, as the servant while so acting was not the agent of his master, but of the miller. *Id.*

See DETINUE, 3; FACTORS; GAMING, 2.

BANK BILLS.

See CRIMINAL LAW, 5-13; WITNESSES, 2.

BANKRUPTCY AND INSOLVENCY.

CONFESSION OF JUDGMENT TO BONA FIDE CREDITOR IS NOT FRAUDULENT DISPOSITION OF INSOLVENT ESTATE, even if it have the effect of giving him a preference over other creditors. *Siegel v. Chidsey*, 125.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; PARTNERSHIP, 10, 14.

BANKS AND BANKING.

See ATTACHMENTS, 1.

BEST EVIDENCE.

See EVIDENCE, 7.

BETS.

See GAMING.

BILL OF EXCEPTIONS.

See PLEADING AND PRACTICE, 20.

BILLS.

See CORPORATIONS, 4; EXECUTORS AND ADMINISTRATORS, 18, 20; INSURANCE, 6; VENDOR AND VENDEE, 5.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

See COMMON CARRIERS, 6, 14, 15.

BONA FIDE PURCHASERS.

PARTY CLAIMING AS BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION PAID, without notice of a trust, must affirmatively prove the payment of the consideration by other evidence than the receipt upon the deed. *Lloyd v. Lynch*, 137.

See AGENCY, 2; EXECUTIONS, 2; FRAUDULENT CONVEYANCES, 6; GAMING, 1; INSURANCE, 3; MORTGAGES, 11; PARTNERSHIP, 19; SALES, 4; TAXATION, 2.

BONDS.

See JUDGMENTS, 15; NOTARIES, 8, 10.

BOOKS.

See EVIDENCE, 2.

BOUNDARIES.

- 1. PAROL EVIDENCE IS ALWAYS ADMISSIBLE TO DETERMINE WHETHER MONUMENTS found on land are identical with those mentioned in the deed describing it. *McAfferty v. Conover's Lessee*, 57.**
- 2. INTENTION OF PARTIES CANNOT TAKE PLACE OF CALL IN DEED which is unambiguous, although the call was in fact not intended by the parties. *Id.***
- 3. EFFECT WILL BE GIVEN TO INTENTION OF PARTIES, IN RESPECT TO CALLS IN DEED, only where the words of description they employ will admit of it, and are not inconsistent with the intention proved; further than this a court of law cannot go. *Id.***

See DEEDS, 9; ESTOPPEL, 2.

BUILDING CONTRACTS.

See DAMAGES, 1; PARTNERSHIP, 1.

BURDEN OF PROOF.

See BONA FIDE PURCHASERS; EXECUTIONS, 33; FRAUDULENT CONVEYANCES, 9; MARRIED WOMEN, 6; NEGOTIABLE INSTRUMENTS, 9; RAILROADS, 1, 2; WATERCOURSES, 3.

BY-LAWS.

See GAS COMPANY.

CALLS.

See DEEDS, 9; BOUNDARIES.

CANALS.

See WATERCOURSES, 1.

CARRIERS.

See COMMON CARRIERS.

CATTLE.

See ANIMALS, 2.

CAVEAT EMPTOR.

See PRORATE COURTS, 2-7.

CERTIFICATES.

See NOTARIES.

CERTIFICATES OF DEPOSIT.

See ATTACHMENTS, 1; CORPORATIONS, 2-4.

CHANCERY.

See EQUITY.

CHARITABLE USES.

See SUBSCRIPTION.

CHARTERS.

See CORPORATIONS, 8.

CHATTEL MORTGAGES.

See MORTGAGES.

CHECKS.

See GAMING, 1; NEGOTIABLE INSTRUMENTS, 8, 9.

CHILD.

See PARENT AND CHILD.

CHOSES IN ACTION.

See ASSIGNMENTS OF CONTRACTS; NEGOTIABLE INSTRUMENTS.

CIRCUMSTANTIAL EVIDENCE.

See FRAUD, 1.

CITY COUNCIL.

See CORPORATIONS, 18.

CIVIL DAMAGE LAWS.

See EXECUTORS AND ADMINISTRATORS, 17.

CHURCHES.

See PEWS; SUBSCRIPTION.

CLAIMS.

See ESTATES OF DECEDENTS, 3-5; MORTGAGES, 16.

CLOUD ON TITLE.

See MARRIED WOMEN, 6.

COLOR OF TITLE.

See DEFINITIONS; TAXATION, 2.

COMMISSIONERS' SALES.

See JUDICIAL SALES, 2, 3.

COMMON CARRIERS.

1. **STEAMBOAT COMPANIES MUST PROVIDE ALL REASONABLE PRECAUTIONS TO protect the property of others. Carelessness in providing means of prevention of injury, or in the use of the means where provided, accompanied by injury to an innocent party, will make the company liable. *Gerke v. Cal. S. N. Co.*, 650.**
2. **FAILURE TO USE SPARK-CATCHERS IS EVIDENCE OF CARELESSNESS in an action against a steamboat company for setting fire to a grain field, and that fact being admitted by the pleadings, with other testimony, justifies a refusal of a nonsuit and sustains the verdict of the jury. *Id.***

3. OWNERS OF FLAT-BOAT HOLDING THEMSELVES OUT AS READY AND WILLING TO RECEIVE FREIGHT from the public generally are common carriers, although only making a single trip, and receiving a part of a cargo only; and the receipt of freight by the master of the boat, in violation of the instructions of the owners, does not affect their liability as common carriers. But if they did not hold themselves out as ready and willing to receive freight from the public generally, but only proposed to take the freight of particular persons with whom engagements were made, they are not common carriers; and the persons shipping freight under receipt from the master of the boat, in violation of the private instructions of the owners, cannot hold them liable as common carriers for loss of the goods. *Steele v. McTyer's Adm'r*, 516.
4. EVIDENCE THAT DEFENDANTS HAD BEEN, IN FORMER YEARS, ENGAGED IN TRANSPORTATION FOR PUBLIC GENERALLY IS ADMISSIBLE and proper for the consideration of the jury in determining the question whether they were common carriers; but it would not necessarily be conclusive. *Id.*
5. WRECK OF FLAT-BOAT UPON SUNKEN LOG IN RIVER IS NOT LOSS FROM "ACT OF GOD;" the human agency directing the boat against the log being the immediate and direct cause of the loss, and such loss is classed among the dangers of the river. *Id.*
6. PAROL EVIDENCE IS ADMISSIBLE OF CUSTOM EXISTING ON PARTICULAR RIVER EXEMPTING FLAT-BOATMEN from losses caused by the dangers of the river, although the bill of lading contains no such exception; but to constitute a good custom, it is requisite that it should have been uniform, and so generally known and acquiesced in, and so well established, that the parties must be presumed to have contracted with reference to it. *Id.*
7. CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE UTMOST CARE; but they are not liable for such perils as occur wholly without their agency, unless there is some want of care in escaping from the consequences of such perils. *Sprague v. Smith*, 424.
8. CARRIER OF PASSENGERS IN HIS OWN CARS OVER CONNECTING LINES is liable as a passenger carrier throughout the route. *Id.*
9. CARRIER OF PASSENGERS IN HIS OWN CARS OVER CONNECTING LINES is not liable for an injury occurring while the cars are upon a connecting line, and caused without his fault by the negligence or misconduct of the operatives of the connecting line, over whom he has no control, unless the connecting roads constitute a general partnership, or are consolidated in their interests. *Id.*
10. SELLING THROUGH-TICKET OVER CONNECTING LINES TO PASSENGERS does not render carrier liable for carriage of passengers beyond his own line; but he is liable for the through transportation of freight and baggage, *semble*. *Id.*
11. CARRIER IS LIABLE FOR LOSS OCCURRING BEYOND HIS TERMINUS, UPON CONNECTING LINE, when he receives goods and receipts for them, "to be delivered on presentation of the receipt" at a specified point beyond his limits of trade as a carrier; and delivery to a connecting line does not free him from obligation to deliver them at the specified place. *Kyle v. Laurens*, 231.
12. INTEREST ON NET VALUE OF COTTON LOST BY CARRIER MUST BE ALLOWED from the date of notice of loss and demand of payment of the carrier. *Id.*

13. CARRIER IS NOT ENTITLED TO FACTOR'S COMMISSIONS AS ABATEMENT OF DAMAGES, where cotton consigned to the factor at a particular place is lost by the carrier on the road. *Id.*
14. IN CONSTRUCTION OF BILL OF LADING, PAROL EVIDENCE IS ADMISSIBLE to show that the words "dangers of the river," by usage and custom, include dangers by fire. *McClure v. Cox*, 552.
15. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN RECITAL IN BILL OF LADING that cotton was shipped on a steamboat, of a custom for steamboats to carry barges in tow, and to store freight at their option, either on boat or barge. *STONE, J.*, dissenting. *Id.*
16. DECLARATIONS OF MASTER OF STEAMBOAT WHILE SPARKS ARE SETTING FIRE TO GRAIN-FIELDS are part of the *res gestæ*, and are admissible in evidence to establish the liability of the owners of the steamboat for the damage done by the fire. *Gerke v. California Steam Navigation Co.*, 650.
17. DECLARATIONS OF DEFENDANTS IN ACTION AGAINST COMMON CARRIER FOR NEGLIGENCE ARE NOT ADMISSIBLE, when the declarations sought to be introduced are statements of facts, which, at the time of giving instructions to the master of his flat-boat not to take any freight until he reached a certain point in the river, the defendant stated as reasons for not taking a full cargo until after reaching the designated point; as, while the instructions given to the master may be admissible, yet it is not permissible to make their admissibility a pretext by which to obtain the benefit of declarations as to facts made at the same time. *Steele v. McTyer's Adm'r*, 516.

See FERRIES; RAILROADS; TRUSTS AND TRUSTEES, 10.

COMMON PLEAS.

See JURISDICTION, 2.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE; MARRIAGE AND DIVORCE, 11; VENDOR AND VENDEE, 13.

COMPLAINT.

See HUSBAND AND WIFE, 11; MARRIAGE AND DIVORCE, 9.

CONCEALMENTS.

See CORPORATIONS, 12.

CONDITIONS.

See NOTARIES, 8.

CONFESSION OF JUDGMENTS.

See BANKRUPTCY AND INSOLVENCY; PARTNERSHIP, 12.

CONFIRMATION.

See AUCTIONS.

CONFLICT OF LAWS.

1. COURT PURSUES LAWS OF ITS OWN STATE IN DETERMINING VALIDITY OF JUDGMENT of a court of a foreign state, in the absence of evidence of a difference in the laws of the latter state. *Moore v. Hood*, 210.

2. CONTRACT TO PAY MONEY, MADE AND TO BE PERFORMED IN NEW YORK, will be governed by the laws of that state relating to usury, although the loan is secured by a mortgage upon lands in Ohio. *Lockwood v. Mitchell*, 78.
3. LEX LOCI CONTRACTUS CONTROLS AS TO CONSTRUCTION AND VALIDITY OF PERSONAL CONTRACTS. *Kanaga v. Taylor*, 62.
4. LEX FORI GOVERNS PROCEDURE AND EVIDENCE in actions on personal contracts. *Id.*
5. CONTRACT MADE IN ONE STATE, AND TO BE PERFORMED IN ANOTHER, will, if it be valid under law where it was made, and not in contravention of the latter's laws, be presumed to have been entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and effect of the contract. *Id.*
6. NO RULE OF COMITY OR INTERNATIONAL LAW REQUIRES COURTS OF ONE STATE TO ENFORCE the law of another, where the law of the latter state clashes with the rights of citizens of the former, or with the policy of its laws. *Id.*
7. CONTRACT VOID UNDER LAW WHERE IT IS MADE IS VOID EVERYWHERE. *Id.*

See ESTATES OF DECEDENTS, 1; MORTGAGES, 10, 13; NOTION, 2-4.

CONNECTED LINES.

See COMMON CARRIERS, 8-11.

CONSIDERATION.

See BONA FIDE PURCHASERS; FRAUDULENT CONVEYANCES, 1, 3; GAMING, 1; NEGOTIABLE INSTRUMENTS, 9; PARTNERSHIP, 11; TRUSTS AND TRUSTEES, 1.

CONSTITUTIONAL LAW.

1. OBLIGATION OF CONTRACT IS IMPAIRED if the end contemplated by it is substantially defeated. A dormant right that cannot be enforced is no right at all. *Robinson v. Magee*, 638.
2. RIGHT AND REMEDY must stand or fall together; to deny the latter is to impair the former. *Id.*
3. OBLIGATION OF CONTRACT MAY BE IMPAIRED without being entirely destroyed. It is impaired if conditions are exacted which did not exist when it was entered into. *Id.*
4. STATUTE REQUIRING HOLDER OF COUNTY WARRANT to present it to the auditor for registry before a day named, or be forever barred from enforcing payment, is unconstitutional. *Id.*
5. GRANT IN FEDERAL CONSTITUTION OF POWER TO CONGRESS TO REGULATE WEIGHTS AND MEASURES does not extinguish the right of the states to deal with the same subject until congress shall have exercised its power in regard thereto. *Weaver v. Fegely*, 151.
6. GRANT OF POWER TO CONGRESS EXCLUDES RIGHT OF STATE over same subject only when the grant is in express terms an exclusive authority to the Union, or where the grant to congress is coupled with a prohibition to the states to exercise the same power, or where the grant to the one would be repugnant to the exercise of a similar authority by the other. *Id.*

See JURISDICTION, 1; NOTION, 4.

CONSTRUCTION.

See CONFLICT OF LAWS, 3; CORPORATIONS, 3; EXECUTORS AND ADMINISTRATORS, 1; ESTATES-TAIL, 5; JURISDICTION, 1; OFFICES AND OFFICERS, 1; PLEADING AND PRACTICE, 1; WILLS, 3.

CONTINUANCE.

See CRIMINAL LAW, 16; PLEADING AND PRACTICE, 18.

CONTRACTS.

1. CONTRACT IS VOLUNTARY AND LAWFUL AGREEMENT by competent parties, for a good consideration, to do or not to do a specified thing. *Robinson v. Magee*, 638.
2. PARTY IS BOUND BY WRITTEN CONTRACT, THOUGH HIS SIGNATURE DOES NOT APPEAR at its end. If his name, written by himself, appear in any part of the agreement, it may be taken as his signature, if it was written for the purpose of giving authenticity to the instrument, and thus operating as a signature. *Fulshear v. Randon*, 281.
3. CONTRACT FOUNDED DIRECTLY ON ILLEGAL CONSIDERATION IS VOID, though the illegal act be prohibited under a penalty only. *Milton v. Haden*, 623.
4. EXECUTORY CONTRACTS MADE TO CONTROL DISTRIBUTION OF MAN'S ESTATE after his death are not binding. *Needles's Ex'r v. Needles*, 85.
5. TO PUT PROOF OF EXECUTION OF CONTRACT UPON OPPOSING PARTY, it must be put in issue by the pleadings, under the provisions of the Texas statute. *Fulshear v. Randon*, 281.
6. WHERE CONTRACT HAS BEEN REDUCED TO WRITING, AND IS INTELLIGIBLE, evidence of what passed between the parties before it was written out, or while it was in preparation, to change or vary its terms, is not admissible. This rule does not exclude agreements or stipulations made after its execution, however. *Bryan v. Hunt*, 262.
7. IT IS COMPETENT, AT ANY TIME BEFORE BREACH OF EXECUTORY WRITTEN CONTRACT TO CHANGE or vary its terms by a parol agreement, or to annul or dissolve it altogether, if done upon a sufficient consideration. *Id.*
8. QUESTION AS TO WHETHER AND WHEN TIME IS OF ESSENCE OF CONTRACT to convey land discussed at length, and numerous authorities referred to, and the doctrine enunciated which the court deems applicable in California. *Green v. Covillaud*, 725.
9. EXPECTATION OR HOPE OF SUCCEEDING TO ANCESTOR'S PROPERTY IS MERE OR REMOTE POSSIBILITY, in which there is no existing right that can be the subject of release. *Needles's Ex'r v. Needles*, 85.

See AGENCY; ALTERATION OF INSTRUMENTS; ASSIGNMENTS OF CONTRACTS; CONFLICT OF LAWS; CONSTITUTIONAL LAW; COVENANTS; DAMAGES, 1; DEEDS, 7; EVIDENCE, 1; EXECUTORS AND ADMINISTRATORS, 12; GUARDIAN AND WARD, 1; INFANCY; INSANITY; LANDLORD AND TENANT; MARRIAGE AND DIVORCE, 1; MERGER; MORTGAGES; PARTNERSHIP, 1, 27; PLEADING AND PRACTICE, 4; RECORDS, 5; SALES; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; SUBSCRIPTION; USURY; VENDOR AND VENDEE.

CONVERSION.

See EXECUTORS AND ADMINISTRATORS, 21; INFANCY, 1.

CONVICTION.

See **CRIMINAL LAW**, 14.

COPARCENARY.

See **CO-TENANCY**, 3, 4, 6, 7.

CORPORATIONS.

1. **DIRECTOR OF RAILROAD COMPANY STANDS IN FIDUCIARY RELATION** to stockholder, and in acting for him in his absence, cannot be regarded as a stranger. *Philadelphia etc. R. R. Co. v. Cowell*, 128.
2. **COURT OF CHANCERY HAS JURISDICTION, AT SUIT OF STOCKHOLDER, TO RESTRAIN CORPORATION** from issuing certificates of deposit with the intent that they should circulate as money when it has no authority so to do, and such issue would subject it and its officers to losses and penalties, and involve a violation of its charter. *Bliss v. Anderson*, 511.
3. **POWER TO ISSUE CERTIFICATES OF DEPOSIT, WITH INTENT THAT THEY SHOULD CIRCULATE AS MONEY**, is not within CHARTER which confers upon an insurance company the power to receive money in trust or on deposit, and "to give acknowledgments for deposits in such manner and form as they may deem convenient and necessary to transact such business." Such power to issue paper for circulation as money is not expressly given in the charter, and when not expressly given in corporate charters, is forbidden by section 1484 of the Alabama code. *Id.*
4. **BILL IN EQUITY IS INSUFFICIENT** which seeks to restrain the directors of an incorporated company from issuing certificates of deposit which show upon their face that they were intended to circulate as money, unless there is an allegation in the bill that they were intended, when issued, to circulate as money. It is not a conclusion of law from the face of the certificates that the purpose of their issue would be that they might circulate as money, but is an inference of one fact from another, which may be overcome by countervailing evidence. *Id.*
5. **MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES FOR INJURY RESULTING FROM NEGLIGENT OFFICIAL CONDUCT** of one of its officers in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation. *Dargan v. Mayor etc. of Mobile*, 565.
6. **MUNICIPAL CORPORATION IS NOT LIABLE TO OWNER OF SLAVE NEGLIGENTLY KILLED BY PEACE-OFFICER** in attempting to arrest him for violating an ordinance forbidding slaves to be abroad at night without lawful permission; such an ordinance is within the political powers of the municipality, and the employment of the officer the necessary means for execution of the power, and from its nature not susceptible of supervision by the municipality. *Id.*
7. **NEGLECT OF TOWN CLERK TO INDEX RECORD FURNISHES NO CAUSE OF ACTION**, under a statute making the town liable for damages accruing to any person from the neglect of the town clerk, unless it is the cause of the alleged injury, which must not result from the plaintiff's want of diligence; therefore it gives no right of action to one who never examined the records, and was therefore not misled by the omission. *Lyman v. Edgerton*, 415.

8. FALSE REPRESENTATIONS OF TOWN CLERK AS TO RECORDS IN HIS OFFICE will not give right of action against town, under a statute making the town liable for the neglect of the town clerk; but to hold the town liable for a defect in the records, the plaintiff must either examine the records, or prove a refusal of the clerk to permit him to do so upon request. *Id.*
9. EXCUSE FOR MAKING REQUEST IS NOT PROVABLE UNDER ALLEGATION OF REFUSAL OF TOWN CLERK to show records upon request. *Id.*
10. REQUEST TO TOWN CLERK TO SHOW RECORDS IS NOT PROVED by testimony that the plaintiff asked the clerk if there was any claim upon the property, and that he made the inquiry to avoid an examination of the records. *Id.*
11. STATEMENTS OF TOWN CLERK RESPECTING RECORDS IN HIS OFFICE ARE NOT OFFICIAL ACTS, and if false, the town is not liable for the injury accruing therefrom, under a statute making the town liable for the neglect or default of the town clerk. *Id.*
12. NEGLECT OF TOWN CLERK, WHETHER FRAUDULENT OR NOT, TO DISCLOSE EXISTENCE OF INCUMBRANCE upon premises to purchaser is not an official neglect for which the town is liable by statute. *Id.*
13. MUNICIPAL CORPORATION IS NOT RESPONSIBLE FOR MALICE OF ITS OFFICERS. *City Council v. Gilmer, 562.*
14. MUNICIPAL CORPORATION, IN CONSTRUCTION OF SEWERS, ACTS MINISTERIALLY, and is responsible for damages caused by the careless and negligent manner in which it discharges that duty. *Id.*
15. ALLEGATION IN DECLARATION AGAINST CITY THAT DEFENDANT "WRONGFULLY" PERMITTED WATER TO FLOW from its sewers upon plaintiff's lots, "wrongfully" refused to repair streets, etc., is demurrable as stating a conclusion of law: the declaration should set forth the facts from which the conclusion of wrongfulness may be deduced. *Id.*
16. DECLARATION AGAINST CITY ALLEGING NEGLECT TO REPAIR STREETS fails to state a cause of action if it does not show that the alleged damage resulted from that breach of duty. *Id.*
17. CITY IS NOT PRIMA FACIE RESPONSIBLE FOR INJURY CAUSED BY FLOW OF RAIN-WATER from the streets upon adjacent lands, since its duty to adopt a system of drainage is legislative. *Id.*
18. MOTIVES OR MALICE OF MEMBERS OF CITY COUNCIL IN REFUSING TO REPAIR STREETS is immaterial and irrelevant in an action against the city for neglect to repair streets. *Id.*
19. IT IS COMPETENT TO PROVE THAT MUNICIPAL CORPORATION refused or failed, when informed of the condition of the street, to repair it, since this tends to establish the fact of negligence. *Id.*
20. EVIDENCE THAT CITY WAS INFORMED AT MEETING OF ITS COUNCIL, through the report of a committee, that some slight repairs had been made upon a ravine in the street, is admissible as conducing to show a recognition of the street as a city street, and that the corporation was informed of the character of the repair of the street, which the plaintiff contended was insufficient. *Id.*
21. PRACTICAL BRICK-MASON WHO HAD BEEN ENGAGED IN CONSTRUCTION OF WALL between plaintiff's land and the street is competent to give his opinion as an expert upon the capacity of the wall to withstand the flow of rain-water on the inner side of the wall upon the plaintiff's land, in an

action against a city for the undermining of the wall by the flow of surface water against the outer side of the wall. *Id.*

- 22. MUNICIPAL CORPORATION IS NOT REQUIRED TO PREVENT FLOW OF WATER** which would be detrimental to contemplated erection, after notification of the owner's intention to build upon his lots; the duty of repairing streets does not involve a duty to protect adjacent lands from a natural flow of water. *Id.*

See AGENCY, 6; GAS COMPANIES; HIGHWAYS, 6; RAILROADS; STATUTE OF LIMITATIONS, 1; TRUSTS AND TRUSTEES, 10.

COSTS.

See EXECUTORS AND ADMINISTRATORS, 30-35; PLEADING AND PRACTICE, 17.

CO-TENANCY.

1. PURCHASE BY TENANT IN COMMON OF OUTSTANDING TITLE inures to benefit of all his co-tenants. *Lloyd v. Lynch*, 137.
2. TENANT IN COMMON CANNOT ACQUIRE INDEPENDENT TITLE AGAINST HIS CO-TENANTS, where the land held in joint tenancy is sold at a treasurer's sale for non-payment of taxes, by taking an assignment of the purchaser's deed before the time for redemption has expired. *Id.*
3. POSSESSION OF ONE CO-HEIR OR CO-TENANT IS POSSESSION OF ALL, as a general rule. *Alexander v. Kennedy*, 358.
4. CO-HEIR'S POSSESSION BECOMES ADVERSE TO OTHER CO-HEIRS by acts or declarations repelling the presumption that the possession is in his character as co-heir, and clearly showing a claim of exclusive right; but the hostile intent of the possession must be manifested by more unequivocal acts than are necessary where there is no privity between the parties. *Id.*
5. OUSTER OF CO-TENANTS MAY BE INFERRED FROM UNDISTURBED POSSESSION OF ANOTHER CO-TENANT for a great length of time, accompanied by notorious acts of exclusive ownership. *Id.*
6. PAYMENT OF TAXES BY CO-HEIR IN POSSESSION DOES NOT ESTABLISH ADVERSE CHARACTER of the possession as against his co-heirs, when standing alone, but is a circumstance which with others will show that fact. *Id.*
7. ONE CO-HEIR LEAVING COMMON PROPERTY WITH OTHER CO-HEIRS for more than statutory period, under circumstances excluding the presumption that they intended to claim adversely, or, at least, that he could have reasonably supposed they so intended, will not bar his right under the statute of limitations, although they have paid the taxes for the whole period. *Id.*
8. DECREE OF PARTITION CANNOT BE COLLATERALLY IMPRACHED by a stranger. *Grassmeyer v. Beeson*, 309.
9. ALTHOUGH PARTITION MADE UNDER DECREE by commissioners appointed for that purpose is invalid, still the decree without partition vests in the party named therein the exclusive title in the land set apart and conveyed to him by it, and constitutes him a tenant in common with the original grantee, and as such he has sufficient title to enable him to maintain an action of trespass to try title against a stranger. *Id.*

See VENDOR AND VENDEE, 1.

COUNTERFEITING.

See CRIMINAL LAW, 5-10.

COUNTIES.

1. PRIVATE PROPERTY OF INHABITANT OF COUNTY IS NOT LIABLE TO SEIZURE and sale under execution to satisfy a judgment against the county. *Emmeric v. Gilman*, 742.
2. CREDITOR OF COUNTY MUST LOOK TO ITS REVENUES alone for payment. *Id.*
3. CALIFORNIA STATUTE AUTHORIZES SUIT AGAINST COUNTY, but gives no remedy by execution. When judgment is rendered against it, it is the duty of the supervisors to pay the claim of the judgment creditor out of funds in the county treasury, provided there be funds not otherwise appropriated; or if there is no fund, and they possess the power, they must levy a tax for the purpose of payment; and if they fail or refuse to pay, or to levy the tax, the creditor can resort to *mandamus* against them; but if there is no fund, nor power to tax, the legislature must be invoked for authority. *Id.*

See CONSTITUTIONAL LAW, 4; HIGHWAYS, 2, 3; POOR-LAWS, 3-6.

COUNTY COURTS.

See SPECIFIC PERFORMANCE, 2, 3;

COURTS.

See APPELLATE COURTS; COMMON PLEAS; COUNTY COURTS; DISTRICT COURTS; JURISDICTION; PLEADING AND PRACTICE, 3; PROBATE COURTS; RECORDS; SUPREME COURTS.

COVENANTS.

COVENANTORS ARE BOUND PERSONALLY BY COVENANT in which they describe themselves as a committee on the part of a certain company, and after reciting a sale of property, bind themselves to deliver it at a designated place and time. *Henderson v. Martin*, 606.

See DEEDS, 7; LANDLORD AND TENANT, 1, 2.

CROPS.

See INFANCY, 1; LANDLORD AND TENANT, 3, 13-15; SALES, 1; TROVER, 1.

CRIMINAL LAW.

1. INFANT BETWEEN SEVEN AND FOURTEEN YEARS OF AGE IS PRIMA FACIE INCAPABLE OF COMMITTING CRIME; but this presumption may be overcome by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability. *Godfrey v. State*, 494.
2. GENERAL PRINCIPLE IS, THAT IF STATUTE CREATING OFFENSE IS REPEALED, no further proceeding can be taken under the repealed law to enforce the punishment after the repealing act takes effect. *Wall v. State*, 302.
3. INDICTMENT FOR AFFRAY NOT ALLEGING FIGHTING in express terms, but charging that the defendants, with force and arms, at a certain time and place, were unlawfully assembled together, and being so unlawfully as-

sembled and arrayed in a warlike manner, then and there did make an affray, to the great terror of divers good citizens, etc., is sufficient. *State v. Washington*, 323.

4. **STYLE OF INSTRUMENT ALONE DOES NOT DETERMINE ITS LEGAL CHARACTER.** A forged instrument in the following form, save the mere spelling, will be regarded as a statutory "order" for the payment of money, and not as a mere request: "Wen 19th. Mr. Davis pleas let the boy have \$6,00 dolers for me. B. W. Earl." *Evans v. State*, 98.
5. **INDICTMENT UNDER RHODE ISLAND STATUTE CONCERNING FORGING OF BANK BILLS**, and the uttering and having in possession counterfeit bank bills, must allege with due certainty that the bill was in imitation of or purported to be issued by some "corporation" "established as a bank," and some proof in support of this allegation must be introduced. *State v. Brown*, 168.
6. **AT COMMON LAW, INDICTMENT FOR POSSESSING OR UTTERING FORGED BANK BILL** with intent to defraud is not maintainable, since to constitute the common-law cheat somebody must have been defrauded or cheated. *Id.*
7. **INDICTMENT FOR POSSESSING OR UTTERING FORGED BANK BILL** is maintainable in Rhode Island, without alleging that it was in imitation of or purported to be issued by some corporation established as a bank, though this allegation is necessary in an indictment under the statute concerning the forging of bank bills and the uttering and having in possession of counterfeit bank bills; for another statute provides an indictment for the forgery or criminal uttering of any promissory note or any writing whatever purporting to contain the evidence of any debt, contract, or promise, and a bank bill fairly comes within the purview of this section. *Id.*
8. **ALLEGATION IN INDICTMENT FOR CRIMINALLY UTTERING FORGED BANK BILL**, that the bill was in imitation of a bill issued by a certain bank, requires proof of the existence of a genuine bank note upon such bank. *Id.*
9. **UTTERING AS TRUE NOTE PURPORTING TO BE ISSUED BY BANK** is an admission by the utterer of the existence of the bank sufficient to prove it in the absence of evidence to the contrary. *Id.*
10. **ON INDICTMENT FOR CRIMINALLY UTTERING COUNTERFEIT BANK NOTES**, it may be proved that the prisoner on the same day passed as genuine spurious as distinguished from counterfeit bank notes, and that when arrested he had several such notes both signed and unsigned in his possession, for the purpose of showing that he knowingly passed the counterfeit bill with the uttering of which he is charged. *Id.*
11. **ON TRIAL FOR LARCENY OF BANK NOTE OF CERTAIN VALUE**, instruction that if jury believe from evidence that the party lost a note of such value, and that the same was afterwards found in defendant's possession, they ought to find the prisoner guilty, unless his possession of the note is explained, is error. *Hunt v. Commonwealth*, 443.
12. **MERE POSSESSION OF GOODS WHICH HAVE BEEN LOST** is not *prima facie* evidence of guilt, nor does it, of itself, raise the suspicion of guilt. *Id.*
13. **FINDER OF LOST GOODS DOES NOT COMMIT LARCENY** simply because he retains property found, when he has general means, by the use of proper diligence, to discover the true owner. To constitute the retention of such

goods a larceny, he must have known the owner at the time of the finding, or the goods must have been so marked that he could ascertain their owner, and must be appropriated to his own use at the time of the finding, with intent to take entire dominion over them. *Id.*

14. **PENAL CODE OF TEXAS, IN REPEALING FORMER LAWS** and abolishing common law, has neither changed the law defining the degrees of murder nor the punishment to be administered upon conviction thereof; hence appellate court may affirm a judgment of conviction which has been regularly rendered, although the repealing act took effect pending the appeal. *Wall v. State*, 302.
15. **INDICTMENT, IN COMMON-LAW FORM, CHARGING MURDER** to have been committed feloniously, willfully, and of malice aforethought, is sufficient to sustain a conviction of murder in the first degree, under the Texas statute. *Id.*
16. **PARTY INDICTED FOR MURDER IS NOT ENTITLED TO CONTINUANCE** of his trial, on the ground of the absence of an important witness, where his affidavit for such continuance fails to show that he had asked for a subpoena for the witness, or that he knew of no other witness by whom he could prove the same facts. *Id.*
17. **EXPRESSED DETERMINATION OF FELONIOUS INTENT, ACCOMPANIED BY FORCE SUFFICIENT TO CARRY INTENT INTO EFFECT**, makes a case of taking by open violence or robbery, as distinguished from a secret taking or mere snatching by surprise from the hand of another. *State v. McCune*, 176.
18. **FACT THAT SURPRISE AIDED FORCE EMPLOYED BY PRISONER** will not prevent the force employed from aggravating the case to one of robbery. *Id.*
19. **TAKING WATCH FROM PERSON IS ROBBERY**, where the prisoner passed his arm through the arm of the prosecutor and used violence sufficient to break the ribbon watch-guard worn by the prosecutor about his neck, at the same time exclaiming, "Damn you, I will have your watch!" notwithstanding the force did not affright, but merely surprised, the prosecutor. *Id.*

See HABEAS CORPUS.

CUSTOMS.

See USAGES.

DAMAGES.

1. **LIQUIDATED DAMAGES OR PENALTY.**—Where defendant agreed to erect a building on such a portion of a lot as would be satisfactory to plaintiff, and give him possession in three weeks, to hold for six months with privilege of twelve months, and upon failure to perform the agreement to pay the sum of five hundred dollars damages: *Held*, that the sum named was a penalty, and not liquidated damages. *Nash v. Hermosilla*, 676.
2. **POWER OF COURT TO INCREASE DAMAGES, SUPER VISUM VULNERIS, IN CASES OF MAYHEM, DOES NOT EXIST** in South Carolina, however such power may have existed at the common law. *McCoy v. Lemon*, 246.
3. **DAMAGES ARE TO BE ASSESSED BY JURY UNDER AUTHORITY OF COURT**, and not by the court independently of the jury, in all cases sounding in damages. In all instances of vindictive damages, or where there is no

rule of law regulating the assessment of damages, the judgment of the jury, and not the opinion of the court, is to govern. *Id.*

See COMMON CARRIERS, 12, 13; CORPORATIONS; EXECUTIONS, 33; GUARANTEE, 2; LANDLORD AND TENANT, 9; NOTARIES, 7; VENDOR AND VENDEE, 14.

DAMS.

See WATERCOURSES.

DANGERS OF THE RIVER.

See COMMON CARRIERS, 5, 6, 14.

DEATH.

See CONTRACTS, 4; DEEDS, 2, 3; ESTATES OF DECEDENTS; EXECUTIONS, 23, 24, 31; EXECUTORS AND ADMINISTRATORS, 3.

DEBT.

See JUDGMENTS, 18, 21.

DECLARATIONS.

See ADVERSE POSSESSION, 2; COMMON CARRIERS, 16, 17; CORPORATIONS, 15, 16; ESTOPPEL, 5-7; EXECUTORS AND ADMINISTRATORS, 13, 15; TRUSTS AND TRUSTEES, 3, 5.

DECREES.

See JUDGMENTS.

DEDICATION.

See PARTNERSHIP, 24.

DEEDS.

1. DISTINCTION BETWEEN WILL AND DEED IS that a will has no operation until the death of the testator, and that a deed must take effect on its execution, and immediately pass the estate or interest given, although it is not essential that this interest shall immediately pass into the possession of the donee. *Babb v. Harrison*, 203.
2. INSTRUMENT IS NOT DEED IF INTEREST CREATED DO NOT ARISE UNTIL DEATH OF DONOR or some other future time, although it may be denominated a deed by the maker, may have express words of immediate grant, may have sufficient consideration to support a grant, and may be formally delivered. *Id.*
3. INSTRUMENT THAT PURPORTS TO CONVEY TITLE AFTER DEATH OF DONOR, or at some future time, is not a deed, though in many respects in the form of one, and may be ineffectual as a will from a lack of the requisite number of witnesses. *Id.*
4. DISTINCTION BETWEEN VOID DEED AND ONE WHICH IS VOIDABLE ONLY is important to observe; for, while nothing can pass by a deed absolutely void, one which is voidable only may be the foundation of a good title in the hands of one who has taken a conveyance in ignorance of the fraud which makes the deed voidable. *Crocker v. Bellangee*, 489.
5. DESCRIPTION OF LAND IN DEED AS BEING "a certain tract or parcel of land lying and situate in the county of Colorado, being a part of the Gilleland

league, and consisting of fourteen labors, which said tract, seised as above, commences at the north-east corner thereof," followed by description by boundaries, is sufficient to identify the land. *Alexander v. Miller's Ex'rs*, 314.

6. RECITAL IN DEED OF PAYMENT OF PURCHASE MONEY is no evidence of the fact of its payment as against third persons. *Lloyd v. Lynch*, 137.
7. WORDS "GOOD AND SUFFICIENT DEED" in a covenant import only a conveyance good in form, and sufficient to pass the title actually held by the covenantor, and not that he would convey a good title. *Green v. Covillaud*, 725.
8. PREVIOUS CONVEYANCE REGISTERED IN INTERVAL BETWEEN EXECUTION SALE AND CONVEYANCE BY SHERIFF supersedes the sheriff's deed; even though it was not registered within the time prescribed by the registry act. *Leger v. Doyle*, 240.
9. DISPOSITION OF SURPLUS LAND WHERE CALLS OF DEED DO NOT INCLUDE ALL LAND INTENDED.—Under an order of chancery, the several lots of a block of land were sold to different persons, the conveyances being similar in form, and referring to a recorded plat for description. The descriptions in the deeds by metes and bounds did not call for so much land as the block contained, though the recorded map showed the whole block was intended to be included. *Held*, that the surplus land should be ratably apportioned among the grantees. *Marsh v. Stephenson*, 72.

See BOUNDARIES; EXECUTORS AND ADMINISTRATORS, 16; FRAUD, 3-5; FRAUDULENT CONVEYANCES, 11; MANDAMUS, 4; NOTICE, 5; POSSESSION, 2; TAXATION, 2; TENDER, 3; TRUSTS AND TRUSTEES, 1, 6-8; VENDOR AND VENDEE.

DEFINITIONS.

COLOR OF TITLE IS THAT WHICH IN APPEARANCE IS TITLE, but which in reality is no title. *Edgerton v. Bird*, 473.

See AFFIDAVITS, 1; CONTRACTS, 1; WEIGHTS AND MEASURES.

DELIVERY.

See NEGOTIABLE INSTRUMENTS, 1; SALES, 2, 3, 5; STATUTE OF FRAUDS, 4; VENDOR AND VENDEE, 4-6.

DELIVERY BONDS.

See JUDGMENTS, 15.

DEMAND.

See STATUTE OF LIMITATIONS, 1.

DEMURRERS.

See CORPORATIONS, 15; INTERPLEADER, 3, 4, 6; PLEADING AND PRACTICE, 21.

DENIAL.

See EJECTMENT, 7; PLEADING AND PRACTICE, 9-17, 21.

DEPOSITIONS.

See AFFIDAVITS; EVIDENCE, 6; PLEADING AND PRACTICE, 18.

DESCENT.

See ESTATES OF DECEDENTS; ESTATES-TAIL.

DESCRIPTION.

See BOUNDARIES; DEEDS, 5, 9; EXECUTIONS, 1, 16; TRUSTS AND TRUSTEES, 7, 8.

DESERTION.

See MARRIAGE AND DIVORCE, 5, 7.

DETAINDER.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

DETINUE.

1. DETINUE WILL NOT LIE AGAINST ONE WHO HAS BEEN DISPOSSESSED of property by legal process, unless the legal custody of the property terminated before levy of the writ. *McArthur v. Carrie's Adm'r*, 529.
2. IN DETINUE, WHERE PLAINTIFF HAS SHOWN PRIOR POSSESSION, and made out a *prima facie* case, the defendant cannot defeat a recovery by showing merely an outstanding title in another with which he has no connection. *Sims v. Boynton*, 540.
3. BAILOR MAY MAINTAIN DETINUE FOR PROPERTY HIRED, without waiting for the termination of the bailment, where such property has been taken from the bailee during the term by a third person, and he declines to sue for the recovery thereof, and notifies the bailor to sue. *Id.*
4. VERDICT IN DETINUE IS SUBSTANTIALLY CORRECT AND IN PROPER FORM where in the following words: "We find all the issues for the plaintiff, and that the slaves named in the proceedings [naming them] are the property of the plaintiff, and that the said slaves are in value worth as follows [naming the values, etc.]; and as the plaintiff releases all damages for hire, we assess the value of said slaves, to wit, three thousand four hundred and fifty dollars, as damages for the plaintiff, to be discharged upon the delivery of said slaves by the defendant to him." *Rambo v. Wyatt's Adm'r*, 544.
5. JUDGMENT IN DETINUE ON VERDICT FOR PLAINTIFF, "that he recover of said defendant the said slaves [naming them], and on the failure of said defendant to deliver said slaves to said plaintiff when said plaintiff demands them, then that the said plaintiff have and recover of the said defendant the sum of three thousand four hundred and fifty dollars, his damages so assessed by the jury," is not proper in form, but the error, being merely clerical, will be corrected on error and affirmed. *Id.*

See EXECUTIONS, 34.

DEVISE.

See MARRIED WOMEN, 1-3; WILLS, 3.

DIRECTORS.

See AGENCY, 6; CORPORATIONS, 1, 4; POOR-LAWS, 4.

DISCOUNT.

See PARTNERSHIP, 17, 20.

DISSOLUTION.

See PARTNERSHIP, 14.

DISTRIBUTION.

See CONTRACTS, 4; EXECUTIONS, 35; EXECUTORS AND ADMINISTRATORS, 4

**PARTNERSHIP, 3, 5.
DISTRICT COURTS.**

**See EXECUTIONS, 25.
DITCHES.**

**See CORPORATIONS; HIGHWAYS.
DIVERSION.**

**See WATERCOURSES.
DIVIDENDS.**

**See AGENCY, 6; STATUTE OF LIMITATIONS, 1.
DIVORCE.**

See MARRIAGE AND DIVORCE.

**DOGS.
See ANIMALS.**

DOMICILE.

OLD DOMICILE CANNOT BE FORFEITED without conclusive proof that a new one has been acquired. *Shepherd v. Cassidy*, 372.

See ESTATES OF DECEDENTS; INSANITY, 2; GUARDIAN AND WARD, 5.

DOWER.

See SPECIFIC PERFORMANCE, 9, 10; TENDER, 3.

DRAINS.

See CORPORATIONS, 14, 15, 17, 21, 22; HIGHWAYS, 4.

DURESS.

See PAYMENT, 2-4.

EJECTMENT.

1. **TITLE OF PERSON UNDER WHOM BOTH PARTIES CLAIM NEED NOT BE PROVED.** *Barnard v. Whipple*, 422.
2. **TO MAINTAIN EJECTMENT UNDER PRIOR POSSESSION,** plaintiff need not show such possession in himself. *Bird v. Lisbros*, 617.
3. **DEFENDANT IN POSSESSION MAY SHOW TITLE IN THIRD PARTY,** where he has a *prima facie* title, and the plaintiff relies on his strict legal title. *Id.*
4. **IN EJECTMENT, WHEN PLAINTIFF CLAIMS TITLE** by virtue of older possession, defendant cannot prove a better title in another party through whom he does not claim. *Piercy v. Sabin*, 692.
5. **DEFENDANT MAY SHOW ABANDONMENT BY PLAINTIFF'S GRANTOR** prior to his conveyance to plaintiff, where plaintiff relies solely on his grantor's possession for title. *Bird v. Lisbros*, 617.

- 6. PARTY HAVING ACTUAL PRIOR POSSESSION MAY RECOVER POSSESSION from second possessor when both claim only by possession, and the suit is between the two parties only. *Humphreys v. McCall*, 621.
- 7. IN EJECTMENT, WHERE ANSWER CONTAINS SIMPLE DENIAL of the allegations in the complaint, defendants cannot introduce in evidence the copy of the record of a former recovery. *Piercy v. Sabin*, 692.
- 8. IN EJECTMENT, PLAINTIFF MAY PROVE that while he and another were in possession each claimed the premises, such claim being part of the *res gestæ*, and admissible to show that the party in possession assumed to hold in his own right, and not in subordination to another. *Id.*
- 9. RECOVERY IN EJECTMENT BY EXECUTOR OR ADMINISTRATOR AGAINST HEIRS OR DEVISEES is conclusive against them in a subsequent action of ejectment for the premises by an administrator *de bonis non*, when the defendants show no right to the premises acquired subsequent to the rendition of that judgment. *Payne's Adm'r v. Payne*, 402.

See EXECUTIONS, 32.

ELECTION.

See EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES, 11, 12; VENDOR AND VENDEE, 16.

ELECTIONS.

- 1. STATE IS BOUND BY STATUTES MADE TO PREVENT TORTIOUS USURPATION, and to regulate and preserve the right of all elections. *Commonwealth v. Garrigue*, 103.
- 2. IT IS NECESSARY TO VALIDITY OF ELECTION THAT GOVERNOR SHOULD ISSUE PROCLAMATION calling such election, and enumerating the offices to be filled thereat. An office not mentioned in such proclamation cannot be filled at such election. *People v. Weller*, 754.
- 3. STATUTES PROVIDING THAT GOVERNOR MUST GIVE NOTICE BY PROCLAMATION CERTAIN NUMBER OF DAYS BEFORE ELECTION of the offices to be filled thereat are mandatory. It is no answer to say that because the constitution provides for the filling of certain offices at the general election such statutes may defeat its operation; as, in case the vacancy occurs immediately before such general election, and after the time for issuing such proclamation had elapsed. *Id.*
- 4. REASON REQUIRING ISSUANCE OF ELECTION PROCLAMATION IS TO GIVE ELECTORS NOTICE that an election is about to be held, and of the offices to be filled thereat. *Id.*
- 5. MODE PRESCRIBED BY STATUTE FOR INQUIRING INTO AND DETERMINING REGULARITY AND LEGALITY of municipal election and of the returns made thereof must be followed as provided, to the exclusion of the common-law mode of redress. *Commonwealth v. Garrigue*, 103.

See ESTOPPEL, 8.

EMINENT DOMAIN.

See HIGHWAYS, 2.

ENTRY.

See ADVERSE POSSESSION, 3; EXECUTIONS, 1.

EQUITABLE ASSIGNMENTS.
See ASSIGNMENTS OF CONTRACTS, 2.

EQUITY.

1. **EQUITY WILL NOT RELIEVE ON GROUND OF IGNORANCE OF FACTS** which the party could have ascertained by the exercise of due diligence. *McDaniel v. State*, 406.
 2. **EQUITY WILL NOT RELIEVE FROM ACT DONE UNDER MISTAKE OF LAW** and advice of counsel, unless there is some additional ground for equitable relief. *Id.*
 3. **SURPRISE IS NOT GROUND FOR RELIEF IN EQUITY UNLESS ACCOMPANIED WITH FRAUD.** *McDaniels v. Bank of Rutland*, 406.
 4. **ALL PERSONS, WHETHER ADULTS OR INFANTS, WHO ARE INTERESTED IN SUIT IN EQUITY, SHOULD BE MADE PARTIES THERETO.** *Moore v. Hood*, 210.
 5. **TWO PERSONS ARE PROPERLY JOINED AS PLAINTIFFS IN BILL IN EQUITY** when both are interested in the property to be recovered, although their interests are not co-extensive. *Blackwell v. Blackwell*, 556.
- See ASSIGNMENTS OF CONTRACTS; CORPORATIONS, 2-4; HUSBAND AND WIFE, 9; INSANITY, 5; INTERPLEADER; JUDGMENTS, 17; JUDICIAL SALES; MORTGAGES; PARTNERSHIP, 3, 7, 9; PAYMENT, 1; PROBATE COURTS, 5, 6; PLEADING AND PRACTICE; SPECIFIC PERFORMANCE; SUBSCRIPTION, 2; TRUSTS AND TRUSTEES, 12; VENDOR AND VENDEE, 4, 5.**

EQUITY OF REDEMPTION.

See MORTGAGES, 2, 7.

ERROR.

See EVIDENCE, 3, 4; EXECUTORS AND ADMINISTRATORS, 2, 9; HABEAS CORPUS; PARTNERSHIP, 20; PLEADING AND PRACTICE.

ESTATES AT WILL.

See LANDLORD AND TENANT, 8, 9, 12-14.

ESTATES FROM YEAR TO YEAR.

See LANDLORD AND TENANT, 8.

ESTATES OF DECEDENTS.

1. **SUCCESSION TO PERSONALTY IS GOVERNED BY LAW OF DOMICILE** of the owner at the time of his death. *Wheeler v. Hollis*, 363.
2. **HEIRSHIP MUST BE AFFIRMATIVELY SHOWN BY THOSE CLAIMING AS SUCH,** and will not be inferred from the fact that they are brothers or sisters of the decedent. *Payne's Adm'r v. Payne*, 402.
3. **AFFIDAVIT TO CLAIM AGAINST DECEDENT'S ESTATE, NOT PURPORTING TO BE BY OWNER** of the claim or by his agent, and not stating the deponent's means of information, affords no justification for the rejection of the claim by the administrator, unless he puts his objection on that ground. *Shelton v. Berry*, 326.
4. **CLAIM TO BE SUBROGATED TO RIGHTS OF ADMINISTRATOR AGAINST INNOCENT PURCHASER** of land held in trust by the deceased, but sold by

the administrator on credit, is not a claim required to be presented to the administrator for allowance. *Vandever v. Freeman*, 391.

5. SUIT TO TRACE TRUST FROM LAND TO MONEY through an estate in process of administration is not a suit upon a claim, required to be presented to the administrator for allowance. *Id.*

See CONTRACTS, 4, 9; ESTATES-TAIL; EXECUTIONS, 23, 24; EXECUTORS AND ADMINISTRATORS; MORTGAGES, 16; PARENT AND CHILD; PROBATE COURT; SPECIFIC PERFORMANCE, 2, 3.

ESTATES-TAIL.

1. LAW OF ESTATES-TAIL DISCUSSED. *Price v. Taylor*, 105.
2. ESTATES-TAIL ARE INCLUDED IN PENNSYLVANIA INTESTATE ACT of April 8, 1833, regulating the descents of real estate, and descend to the heirs generally, and not to the eldest son. *Id.*
3. ESTATE-TAIL HAS BUT ONE LIFE'S DURATION if the donee dies without leaving issue at his death, but it is not shortened by the fact of there being a limitation over on that condition. *Id.*
4. FEE IS CONVERTED BY IMPLICATION INTO ENTAIL by limitation over on indefinite failure of issue; but if, instead, the limitation over be on default of issue at death of the first taker, no such implication arises, and the limitation over merely reduces the fee to a conditional one. *Id.*
5. UNDER RULE OF INTERPRETATION THAT FAVORS HEIR IN DOUBTFUL CASES, Pennsylvania courts incline in favor of estate-tail where it descends to all the children equally, as such course would be in exact accordance with the Pennsylvania laws of lineal descent. *Id.*
6. PURPOSE OF PENNSYLVANIA ACT OF APRIL 27, 1855, is to convert words of entailment in estates thereafter created into words of general inheritance in fee, and thereby repeals the statute *de donis conditionalibus*. *Id.*

See WILLS, 3.

ESTOPPEL.

1. ACTS CONSTITUTING ESTOPPEL IN PAIS MUST BE WILLFUL to operate as a forfeiture of land. *McAfferty v. Conover's Lessee*, 57.
2. AGREEMENT BY MISTAKE UPON ERRONEOUS LINE AS BOUNDARY, supposing it to be the true one, will not operate as an estoppel upon the parties where the true line is in fact unquestionable. *Id.*
3. PARTY IS ESTOPPED TO DENY RIGHT IN EXISTENCE OF WHICH HE INDUCED PURCHASER TO CONFIDE, and on faith of which he purchased, and a subsequent purchase by the former and assertion of a better title to the land is void where he encouraged the vendee to buy the land, acted as his agent in the purchase, adjusted the lines, paid the taxes, and received a commission on the purchase money. *Beaupland v. McKeen*, 115.
4. OMISSION TO ASSERT RIGHT WILL ESTOP PARTY ONLY WHERE SILENCE AMOUNTS TO FRAUD; but as to acts done, a different rule applies, and a party may be estopped without fraud, on the principle that between two innocent persons he whose acts occasioned the loss must suffer. *Id.*
5. PARTY MAKING EXPRESS DECLARATION WILL BE ESTOPPED to deny its truth, where it was not confidential, but general, and has been acted upon by others. *Mitchell v. Reed*, 647.

6. ESTOPPEL OPERATES BECAUSE DECLARATION HAS BEEN ACTED ON, and not because of its truth or falsity or the intention with which it was made. *Id.*
 7. FACTS WORKING ESTOPPEL.—Where H., a clerk, sold liquor in M.'s store, and M. declared it belonged to H., *held*, that when attached for the debts of H., M.'s declaration estopped him from claiming the property. *Id.*
 8. ONE WHO GIVES MONEY TO AGENT TO BET UPON ELECTION, IN AGENT'S NAME, is not estopped to deny that the money is the agent's when it has been attached as such in the hands of one with whom the agent has deposited it, by the agent's creditors. *Hardy v. Hunt*, 787.
 9. DEFENDANT IN EXECUTION IS NOT ESTOPPED FROM DENYING SHERIFF'S DEED, where it is made to one who was neither a purchaser at the sale, nor his assignee, devisee, or heir. *Landrum v. Hatcher*, 237.
 10. USURPER OF FRANCHISE CANNOT CLAIM ALLEGIANCE FROM LESSEE which would be due from a tenant to his landlord, and therefore the lessee of a ferry, when sued on a note given for the rent, is not estopped from setting up want of title in his lessor to the franchise. *Milton v. Haden*, 523.
- See MARRIAGE AND DIVORCE, 11; VENDOR AND VENDEE, 15.

EVIDENCE.

1. WRITTEN CONTRACT, SIGNATURES of the parties to which appear to be in the same handwriting, is admissible in evidence. *Fulshear v. Randon*, 281
 2. SCIENTIFIC, PROFESSIONAL, OR BUSINESS BOOKS OR PUBLICATIONS ARE NOT EVIDENCE of the facts stated therein, though admissible to show the state of invention, the course of composition, the meaning of words, or the theories or opinions prevailing in the age in which they were written. *State v. Brown*, 168.
 3. ADMISSION OF SUPERFLUOUS OR REDUNDANT EVIDENCE, plaintiff's case being conclusively established without it, is not error of which defendant can complain, being merely error without injury. *Sims v. Boynton*, 540.
 4. ERROR IN INTRODUCING SECONDARY EVIDENCE IS CORRECTED AND OVERCOME by the subsequent introduction of primary evidence to the same point. *Lockridge v. Baldwin*, 385.
 5. RECORD IS NOT EVIDENCE OF FACTS RECITED, EXCEPT BETWEEN PARTIES OR PRIVIES. *Wilson v. Campbell*, 586.
 7. DEPOSITION IS NOT ADMISSIBLE AGAINST OBJECTION when it does not appear that the requisitions of the statute have been substantially complied with, as where the deponent died before signing it, or swearing to it. *Id.*
 7. COPY OF RECORD OF SUIT IS BEST EVIDENCE OF PARTICULAR INDEBTEDNESS of the defendant in execution, in a proceeding to enforce the execution against property alleged to have been fraudulently transferred by such defendant. *Mills v. Howeth*, 331.
- See ADVERSE POSSESSION, 2; BONA FIDE PURCHASERS; BOUNDARIES; COMMON CARRIERS, 4, 6, 14-17; CONFLICT OF LAWS, 4; CONTRACTS, 6; CORPORATIONS, 10, 19-22; CRIMINAL LAW, 9, 10; DEEDS, 6; EJECTMENT, 7, 8; EXECUTIONS, 22, 32; EXECUTORS AND ADMINISTRATORS, 2, 13, 15; FRAUD, 1, 5; FRAUDULENT CONVEYANCES, 7; HUSBAND AND WIFE, 9; NEW TRIAL, 2; NOTARIES, 3, 9; PARTNERSHIP, 20, 21; PLEADING AND PRACTICE, 19, 20, 26, 27; SALES, 5; TAXATION, 2; TRUSTS AND TRUSTEES, 3, 4; USURY, 1; WITNESSES.

EXCEPTIONS.

See PLEADING AND PRACTICE, 20-22, 24, 32.

EXECUTIONS.

1. MISDESCRIPTION IN DATE OF ENTRY OF JUDGMENT shown to have been a mere clerical error is not material, when the execution describes the judgment in every other particular except the date of its rendition, thus sufficiently identifying it as the judgment upon which the execution issued. *Alexander v. Miller's Ex'rs*, 314.
2. FORGED EXECUTION IS VOID, AND NO TITLE CAN BE ACQUIRED UNDER IT by an innocent purchaser without notice. *Silvan v. Coffee*, 371.
3. INSTRUCTION WHICH PRECLUDES JURY FROM INQUIRING INTO FACT OF FORGED EXECUTION IS ERRONEOUS. Proof that defendant had knowledge of or was concerned in the commission of the forgery makes no difference. A forged execution is absolutely void, and not merely voidable. *Id.*
4. SALE UNDER DORMANT EXECUTION IS NULL AND VOID. *Godbold v. Lambert*, 192.
5. COLT FOUR MONTHS OLD IS NOT EXEMPT FROM EXECUTION, as forming with its mother a "span of horses," within the meaning of the Wisconsin statute. *Ames v. Martin*, 468.
6. UNDER STATUTORY PROVISIONS OF LAW OF TEXAS, the various articles of personal property exempt from execution secured to the debtor must exist, and he must be the owner of them, before the benefit of the statute can be claimed by him. *Franklin v. Coffee*, 292.
7. STATUTE EXEMPTING FROM EXECUTION "SUCH SUITABLE TOOLS AS MAY BE NECESSARY FOR UPHOLDING LIFE" exempts not only the shoe-making tools of one whose principal occupation was shoe-making, but who also carried on farming, and lived isolated, and did his own repairing of farming implements, but also such farming tools as are used by hand, and the simple tools necessary for the repairing of farming implements. *Garrett v. Patchin*, 414.
8. "NECESSARY," IN STATUTE EXEMPTING "SUCH SUITABLE TOOLS AS MAY BE NECESSARY FOR UPHOLDING LIFE," includes such convenient or useful tools as a man procures for his personal use, unless extravagant; and tools aggregating ten dollars in value are not extravagant. *Id.*
9. "TOOLS," IN STATUTE EXEMPTING "SUCH SUITABLE TOOLS AS MAY BE NECESSARY FOR UPHOLDING LIFE," includes such farming implements as are used by hand, but not such as are used by means of oxen or horses, such as carts, plows, etc. *Id.*
10. COMPLAINT ALLEGING THAT PARTY AS SHERIFF, under an execution against plaintiff, levied on and sold certain property which was the homestead of plaintiff, and claiming damages in two thousand dollars, does not state facts sufficient to constitute a cause of action. *Kendall v. Clark*, 691.
11. NO DAMAGE RESULTS FROM SALE OF HOMESTEAD property under execution, as the sheriff's deed in such case conveys no title, and the purchaser acquires no right to the property sold. *Id.*
12. INTEREST OF MINER IN HIS MINING CLAIM ON PUBLIC LANDS IS PROPERTY, and not having been exempted by law, may be taken in execution. *McKeon v. Bisbee*, 642.

13. **LEVY OF EXECUTION UPON PEW AS REALTY TRANSFERS TITLE** as against a prior assignment of a certificate of ownership thereof, recorded by the clerk of the society occupying the church, in accordance with the by-laws of the society, which provided for a transfer of pews in this way. *Barnard v. Whipple*, 422.
14. **ALTERATION IN LEVY MADE BEFORE ADVERTISEMENT** or notice, or before anything is done under the levy as first made, will not invalidate it; nor is it an objection to the levy as finally made that it was made at the instance of the attorney of the plaintiff in the execution. *Alexander v. Miller's Ex'rs*, 314.
15. **RATIFICATION OF LEVY AS FINALLY MADE** is a waiver of any valid objection to the manner in which it has been made. *Id.*
16. **DESCRIPTION IN LEVY**, THAT "BY VIRTUE OF the within execution, I have levied on fourteen labors of the Gilleland league of land, or so much of said tract as will satisfy the within execution, commencing at the north-west corner," and that the "tract to be offered [for sale] to commence at the north-east corner thereof," is sufficient to identify the land. *Id.*
17. **SALE OF LAND BY SHERIFF UNDER LEVY MADE FOUR YEARS PREVIOUSLY BY PREDECESSOR IN OFFICE** IS VALID. *Leger v. Doyle*, 240.
18. **SHERIFF IS NOT PROHIBITED FROM PURCHASING LAND AFTER EXPIRATION OF HIS TERM OF OFFICE**, even though it is sold under a levy made by himself while in office; such a purchase is not contrary to the letter nor reason of the statutes passed to prevent a sheriff from buying directly or indirectly at his own sale. *Id.*
19. **REGULARITY IN PROCEEDINGS LEADING UP TO SHERIFF'S SALE** WILL BE PRESUMED, in the absence of proof to the contrary. *Id.*
20. **IRREGULARITY IN SELLING LANDS UNDER FIERI FACIAS CLAUSE IN VENDITIONI EXPOS** CAN BE TAKEN ADVANTAGE OF by the judgment debtor only, in a direct proceeding, and cannot be made a question among his creditors on a distribution of the proceeds arising from the sale. *Lawson v. Jordan*, 596.
21. **UNRECORDED SHERIFF'S DEED OTHERWISE VALID AGAINST DEBTOR** IS VALID AGAINST HIM and all the world, except such creditors and purchasers as are protected by the registry acts, notwithstanding the debtor remained in possession thereafter for twenty years; and when the deed is recorded, it is not liable to be defeated for previous neglect of any prescribed time for registering by rights subsequently acquired. *Leger v. Doyle*, 240.
22. **SHERIFF'S DEED IS NOT INADMISSIBLE BECAUSE OF VARIANCE** between the judgment and execution, and the recital thereof in the deed. *Wilson v. Campbell*, 586.
23. **LANDS BID OFF AT SHERIFF'S SALE ARE DEVISABLE AND DESCENDIBLE AS REAL ESTATE**, and the sheriff's deed should be made to the heir at law of the purchaser in case of his death prior to the completion of the purchase, and not to the legatee or devisee under a will made before the purchase; nor does the payment of the purchase money by the testator's executor change the rule. *Landrum v. Hatcher*, 237.
24. **HEIR AT LAW IS ENTITLED TO HAVE LAND PAID FOR OUT OF BEQUEATHED PERSONAL PROPERTY**, when the testator, after making his will, bids off the land at sheriff's sale, and dies before paying for the same. *Id.*

25. DISTRICT COURT HAS JURISDICTION TO RECOVER FROM BIDDER, who fails to comply with the terms of an execution sale, twenty per cent on the value of the property bid off by him, although the amount to be recovered is less than one hundred dollars. *Lockridge v. Baldwin*, 385.
26. SALE UNDER WRIT OF VENDITIONI EXPOSAS IS SALE "BY VIRTUE OF EXECUTION," within a statute providing "that if any person shall bid off property at any sale made by virtue of an execution, and shall fail to comply with the terms of the same, he shall be liable," etc. *Id.*
27. PURCHASER AT EXECUTION SALE MUST COMPLY or manifest readiness to comply with the terms of the sale before he can expect a deed to be given or even tendered to him. *Id.*
28. EXECUTION PURCHASER HAS NO LEGAL ESTATE IN PREMISES UNTIL CONVEYANCE EXECUTED. He has only a right to an estate which may be perfected by a conveyance. *McMillan v. Richards*, 655.
29. TITLE TO LAND SOLD UNDER EXECUTION REMAINS IN EXECUTION DEFENDANT until delivery of conveyance to the purchaser; and the conveyance when delivered does not relate back to the time of the sale; the interest acquired by the purchaser is only such an equitable interest as exists under every contract to buy. *Leger v. Doyle*, 240.
30. IT SEEMS THAT TITLE OF PURCHASER OF REAL ESTATE AT SHERIFF'S SALE DEPENDS upon the execution, levy, and sale, and cannot be affected by the return. *Ritter v. Scannell*, 775.
31. EXECUTION REGULAR ON ITS FACE IS ADMISSIBLE TO SHOW TITLE in purchaser thereunder, though its validity is contested on the ground that the plaintiff therein was dead at the time of its issuance; for the death of the execution plaintiff is a fact for the determination of the jury. *Wilson v. Campbell*, 586.
32. PLAINTIFF IN EJECTMENT AGAINST PURCHASER AT EXECUTION SALE cannot introduce to impeach the execution a motion by the execution plaintiff and the action of the court thereon, when he was neither a party nor privy to the execution. *Id.*
33. UNDER TEXAS STATUTE, SHERIFF WHO FAILS TO RETURN EXECUTION as directed by law is *prima facie* liable to the plaintiff in the execution for the full amount of the debt, interest, and costs; but this is not conclusively the measure of damages. The officer may avoid the liability by proving a reasonable excuse for his failure to make the return, or that the plaintiff has sustained no injury. The burden is, however, upon him to so prove; and where he pleads that the judgment debtor was insolvent, and that consequently the plaintiff has sustained no injury, he may be held liable for nominal damages and costs. *Smith v. Perry*, 295.
34. SHERIFF MAY AMEND RETURN TO WRIT, BY LEAVE OF COURT, IN DETINUE, so as to make the return correspond to the facts; and such amended return relates back to the time when it ought to have been made. *McArthur v. Carrie's Adm'r*, 529.
35. PROCEEDS OF REAL ESTATE SOLD UNDER VARIOUS EXECUTIONS MUST BE APPLIED to those executions under which the property was sold, and according to the priority of the judgment liens, without regard to prior judgments not levied. *Lawson v. Jordan*, 596.
36. REDEMPTIONER, TO REDEEM, MUST PAY FULL AMOUNT OF JUDGMENT in favor of a mortgagee who purchases at the foreclosure sale for less than the face of the judgment. The amount bid and interest, and

eighteen per cent named in the statute, is insufficient. *McMillan v. Richards*, 655.

37. SUITS BY ATTACHMENT AND INJUNCTION TO OBTAIN AND SECURE REPAYMENT of money overpaid upon redemption do not impair the legal effect of the payment. *Id.*

See COUNTIES; DEEDS, 8; DETINUE, 1; ESTOPPEL, 9; EVIDENCE, 7; HUSBAND AND WIFE, 1, 2; JUDGMENTS, 11, 12, 14-16, 20, 21; LANDLORD AND TENANT, 12, 14; MANDAMUS, 4; MARRIED WOMEN, 4, 6; PARTNERSHIP, 5; STATUTE OF FRAUDS, 1, 2.

EXECUTORS AND ADMINISTRATORS.

1. CONSTRUCTION OF ORDER GRANTING LETTERS OF ADMINISTRATION is question for the court, and it is the duty of the court to instruct the jury regarding its validity. *Sims v. Boynton*, 540.
2. CHARGE WHICH MAKES VALIDITY OF LETTERS OF ADMINISTRATION depend on sufficiency of parol evidence, when they appear valid from their face, is not error of which defendant can complain, being merely error without injury. *Id.*
3. VALID GRANT OF LETTERS OF ADMINISTRATION BY DOMESTIC TRIBUNAL OF EXCLUSIVE JURISDICTION is *prima facie* evidence of the death of the intestate, and that he died intestate. *Id.*
4. THERE MUST BE ADMINISTRATOR OF ESTATE OF WHICH DISTRIBUTION IS sought, and he must be made party to suit; it is not sufficient to file the bill against the personal representative of the deceased administrator, but an administrator *de bonis non* must be appointed. *Blackwell v. Blackwell*, 556.
5. UNDER CALIFORNIA STATUTE, EXECUTOR OR ADMINISTRATOR CANNOT RESIGN his appointment until he has settled his accounts and delivered the estate to such person as may be appointed by the court. Under this statute, the permission given in the one case is a negative upon the right of resignation in all others. *Per MURRAY, C. J. Haynes v. Meeks*, 703.
6. ACCEPTANCE BY PROBATE COURT OF RESIGNATION of administrator before he has settled his accounts with the estate is illegal and void. *Per MURRAY, C. J. Id.*
7. ORDER OF PROBATE COURT RECITING FILING OF RESIGNATION of an administrator, and directing him to turn over the effects of the estate to the public administrator, and that he settle with such administrator by the first day of the next term, that when such settlement should be made, then the administrator and his sureties should be released from further liability, when taken in connection with the appointment subsequently of an administrator *de bonis non*, is sufficient proof of the acceptance by the probate court of the resignation of the administrator first appointed. *Per BURNETT, J. Id.*
8. MARRIED WOMAN MAY RESIGN OFFICE OF ADMINISTRATRIX, under letters of administration granted to her while sole, without the concurrence of her husband; and her resignation terminates her husband's administration. *Rambo v. Wyatt's Adm'r*, 544.
9. RIGHT OF PROBATE COURT TO ACCEPT RESIGNATION OF ADMINISTRATOR under proper circumstances is clear; and where his resignation is accepted before the settlement of his account with the estate, this is only

the erroneous exercise of jurisdiction, and cannot be attacked collaterally. *Per* BURNETT, J. *Haynes v. Meeks*, 703.

10. QUESTION NOT DECIDED AS TO WHETHER WANT OF SUFFICIENT NOTICE BY ADMINISTRATOR of an application to sell real estate can be set up as defense in an action of ejectment. It would seem, however, that the equities of all parties could be better settled in a direct proceeding to set aside the sale. *Id.*
11. WHETHER SALE OF REAL ESTATE BY ADMINISTRATOR WITHOUT SUFFICIENT NOTICE would be void or merely voidable may be matter of grave doubt, such sale being a proceeding *in rem*. *Id.*
12. SALES BY EXECUTORS ARE JUDICIAL, and the contract with the bidder need not be signed by the parties. *Halleck v. Guy*, 643.
13. IN ACTION BY ADMINISTRATOR DE BONIS NON, against one claiming under the purchaser at a sale by the prior administratrix, where the validity of such sale is in issue, the declarations of the administratrix, expressing her opinion that the sale was good, are not admissible evidence for the purchaser; nor is evidence admissible to prove that the administratrix applied the proceeds of the sale to the support and education of the intestate's children. *McArthur v. Carrie's Adm'r*, 529.
14. RECEIPT BY DISTRIBUTEES OF DECEDENT'S ESTATE OF PROCEEDS OF UNAUTHORIZED SALE by the administrator will not operate as a ratification of the sale, unless such distributees were of lawful age when they received the said proceeds, and knew the facts regarding such sale. *Id.*
15. DECLARATIONS OF ADMINISTRATOR IN CHIEF THAT SALE OF INTESTATE'S PROPERTY, made by him, was private, and therefore void, are not competent evidence for the succeeding administrator, for the purpose of impeaching the sale and recovering the property from one claiming under the purchaser at such sale. *Id.*
16. EXECUTOR'S DEED CONTAINS NO WARRANTY, and only conveys the title of the deceased to the purchaser. *Halleck v. Guy*, 643.
17. ADMINISTRATOR MAY MAINTAIN ACTION FOR BENEFIT OF NEXT OF KIN OF DECEASED, under statute of March 25, 1851, entitled "An act requiring compensation for causing death by wrongful act, neglect, or default," and giving a right of action for the exclusive benefit of the widow and next of kin; although deceased leave no widow or children, and though the petition do not contain a statement of special circumstances rendering the death a pecuniary injury to such next of kin. Such special circumstances affect only the amount of the recovery. *Johnson v. Cleveland etc. R. R. Co.*, 75.
18. ADMINISTRATOR IS NOT OBLIGED TO SUE IN HIS REPRESENTATIVE CAPACITY for the recovery of personal chattels of his intestate which he has had in his possession as such administrator; he may sue for and recover them in his individual capacity, on proof of his intestate's title, and his own possession as administrator. *Sims v. Boynton*, 540.
19. WIFE'S PERSONAL REPRESENTATIVE MAY JOIN WITH HUSBAND IN BILL to recover her distributive share of her father's estate, where the bill shows that a marriage contract secures to the husband and a life estate in the wife's personalty, with a separate estate in remainder to her, and that the husband is made, by the wife's will, her sole executor and legatee. *Blackwell v. Blackwell*, 556.

20. ADMINISTRATOR, WHO QUALIFIES AFTER FILING OF BILL TO RECOVER DECEDENT'S PROPERTY, may be brought in as co-complainant therein by means of a supplemental bill, for the grant of letters relates to the time of the death. *Id.*
21. DISTRIBUTEES MAY CHARGE ADMINISTRATORS WHO CONVERT PROPERTY OF ESTATE into other specific effects with the value of the converted property, or may elect to claim and pursue the property for which it has been exchanged. *Id.*
22. EXECUTORS AND ADMINISTRATORS CANNOT INVOKE STATUTE OF LIMITATIONS to protect their possessions against the claim of distributees, unless they have denied the continuance of the trust, or set up claim in their own right. *Id.*
23. SETTLEMENT AND PAYMENT OF DISTRIBUTIVE INTERESTS ARE ORDINARILY PRESUMED after a lapse of twenty years from the time when the executor or administrator should have settled the administration. *Id.*
24. SETTLEMENT AND PAYMENT OF DISTRIBUTIVE INTERESTS ARE NOT PRESUMED from lapse of twenty years after the administration should have been settled, when the personal representative holds not in his own right, but in subordination to and recognition of the rights of the cestui que trust. *Id.*
25. ADMINISTRATOR IS CHARGEABLE ON FINAL SETTLEMENT WITH REASONABLE RENT for house and lot belonging to the estate and occupied by him. *Henderson v. Simmons*, 590.
26. EXPENSE OF REPAIRING HOUSE BELONGING TO ESTATE WILL BE ALLOWED AS CREDIT to administrator, upon proof that the repairs were necessary, and that the price was reasonable and has been paid. *Id.*
27. CREDITOR'S RECEIPT FOR DEMAND ENTITLES ADMINISTRATOR TO CREDIT for payment of the same, though it appears that the subject is still open for adjustment upon the settlement of their private accounts. *Id.*
28. ADMINISTRATOR MUST PERFORM ALL ORDINARY SERVICES OF ADMINISTRATION if reasonably within his power, and he is not entitled to special or extraordinary compensation therefor. *Id.*
29. ADMINISTRATOR MAY EMPLOY AGENTS FOR EXTRAORDINARY SERVICES OF ADMINISTRATION, and for such as, in their nature, require a degree of skill or appliances not within the command of ordinary persons; and reasonable expenses incurred in this way for the benefit of the estate are a proper charge against it. *Id.*
30. REASONABLE COSTS AND EXPENSES OF PROFOUNDING WILL FOR PROBATE are a proper charge upon the estate, if the executor have no knowledge or reasonable grounds for suspicion against the legality of the will, and propound the paper in good faith. *Id.*
31. SUCCEEDING ADMINISTRATOR MAY PAY REASONABLE COSTS AND EXPENSES OF PROFOUNDING WILL FOR PROBATE and charge the estate therewith, when the executor propounded the will *bona fide*, and after incurring such expenses resigned the trust without making payment, and received no credit in his account for such expenses. *Id.*
32. EXPENSES OF PROFOUNDING PAPER FOR PROBATE AS WILL are not a proper charge against the estate, when the executor incurs the expenses in a fruitless attempt to establish the will while there are within his knowledge good grounds against its validity; but this question depends in a

great degree upon the good faith of the executor and the circumstances of the particular case, *semble*. *Id.*

33. RIGHT TO CHARGE ESTATE WITH EXPENSES OF PROPOUNDING WILL FOR PROBATE is limited to proper expenses incurred in a fair and lawful trial of the issue *devisavit vel non*, and does not embrace money paid to silence opposition to the establishment of the will. *Id.*
34. ATTORNEY FEES FOR SERVICES AT CONTEST OF PROBATE OF SUPPOSED WILL are not allowable on final accounting of administrator *de bonis non*, if such services were not engaged by the proponent and executor, but by the principal legatee under the will, who afterwards became the administrator *de bonis non*. *Id.*
35. COSTS OF SUITS AGAINST ADMINISTRATOR ON WITNESS CERTIFICATES issued in an action instituted by him are not a proper charge against the estate, when it appears that the certificates were a proper charge against the estate, and that at the time of the commencement of suits thereon he had in his hands assets sufficient to pay them. *Id.*
36. LAW DOES NOT VISIT ADMINISTRATORS WITH SEVERER INTENDMENTS, in the matter of allowances to them, than are indulged against agents generally. *Id.*
37. VALIDITY OF GRANT OF ADMINISTRATION DE BONIS NON depends on the vacancy of the office of administrator at the time of appointment, by the death, resignation, or removal of the preceding administrator. *Rambo v. Wyatt's Adm'r*, 544.

See EJECTMENT, 9; ESTATES OF DECEDENTS, 4, 5; PARTNERSHIP, 27; PROBATE COURTS; STATUTE OF FRAUDS, 2; TRUSTS AND TRUSTEES, 9; WITNESSES, 1.

EXEMPTIONS.

See EXECUTIONS, 5, 12; HOMESTEADS.

EXPECTANCIES.

See CONTRACTS, 9.

EXPERTS.

See CORPORATIONS, 21; WITNESSES, 2, 4.

FACTORS.

RULE THAT FACTOR CANNOT PLEDGE GOODS APPLIES ONLY TO TECHNICAL FACTORS, whose notorious duty is to sell goods of others consigned to them for that purpose, in California, affirming *Hutchinson v. Bourne*, 6 Cal. 383. *Horr v. Barker*, 791.

FALSE REPRESENTATIONS.

See CORPORATIONS, 8, 11; FRAUD, 4, 5.

FEE.

See ESTATES-TAIL, 4; PARTNERSHIP, 22.

FEES.

See EXECUTORS AND ADMINISTRATORS, 34.

FEMES COVERT.

See MARRIED WOMEN.

FENCES.

See ANIMALS, 2-4.

FERRIES.

1. **RIGHT TO KEEP PUBLIC FERRY FOR TOLL** has, under the Alabama statutes, since the year 1820, been a franchise which could not be exercised without license or legislative grant, and the unauthorized exercise of which has been prohibited under a penalty. *Milton v. Haden*, 523.
2. **UNINTERRUPTED EXERCISE OF FERRY FRANCHISE FOR TWENTY YEARS** raises presumption of license, and such presumption cannot be impaired by proof that there was no license or legislative grant of the franchise. *Id.*
See ESTOPPEL, 10.

FINDER.

See CRIMINAL LAW, 13.

FIRE.

See COMMON CARRIERS, 2, 14, 16.

FLAT-BOATS.

See COMMON CARRIERS, 3, 5, 6, 17.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. **ACTION OF FORCIBLE ENTRY AND DETAINER** against three persons; verdict of guilty as to two, and not guilty as to the third: *Held*, that the verdict is conclusive that plaintiff was peaceably in actual possession of the premises at the time of the entry; and that such possession being incompatible with the lawful possession of another, the verdict is conclusive against the possession of the third person. *Fremont v. Crippen*, 711.
2. **UNDER WRIT OF RESTITUTION IN ACTION OF FORCIBLE ENTRY AND DETAINER**, the sheriff is authorized to dispossess parties who, though strangers to the proceedings, have entered into possession after the commencement of the action. *Id.*

See MANDAMUS, 1.

FORECLOSURE.

See MORTGAGES.

FORFEITURE.

See DOMICILE; ESTOPPEL, 1; HOMESTEADS, 2, 4-8, 12; LANDLORD AND TENANT, 4.

FORGERY.

See CRIMINAL LAW, 4-10; EXECUTIONS, 2, 3; WITNESSES, 2-4.

FORMER RECOVERY.

See EJECTMENT, 7.

FRANCHISES.

See ESTOPPEL, 10; FERRIES.

FRAUD.

1. CIRCUMSTANCES NEED NOT BE SO CONCLUSIVE IN THEIR NATURE and tendency as to exclude every other hypothesis than the one sought to be established in order to authorize a jury to deduce from circumstantial evidence the conclusion of fraud. *Linn v. Wright*, 282.
 2. QUESTION OF FRAUDULENT INTENT IS QUESTION OF FACT within the province of the jury to decide. *Id.*
 3. INSTRUCTION WITHDRAWING QUESTION OF FRAUD IN PROCURING DEED FROM IMBECILE woman from the jury, and leaving them to determine solely the question of mental capacity, is error if there is any evidence of fraud or imposition, even though it appears from other parts of the charge that the court did not intend to take the entire consideration of the question of fraud from the jury, unless the error is clearly and completely corrected by the charge as a whole. *Ellis v. Mathews*, 353.
 4. DEED OF GIFT EXECUTED BY AGED WOMAN OF WEAK OR IMBECILE UNDERSTANDING, conveying her whole property to one of her children, must be set aside if there is evidence that any misrepresentation or imposition was practiced upon her. *Id.*
 5. EVIDENCE OF REPRESENTATION TO AGED AND IMBECILE WOMAN EXECUTING DEED of gift of her whole property to a daughter, made at the time by the daughter's husband in her presence, that the property would not be taken out of the mother's possession during her life, is a material circumstance in determining whether the deed was procured by fraud or imposition, where the daughter and her husband sue to recover the property from the mother; and it is error to exclude consideration of it from the jury. *Id.*
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY AND INSOLVENCY; CORPORATIONS, 12; ESTOPPEL, 4; GAS COMPANIES, 5; GUARDIAN AND WARD, 5; INSANITY, 5; JUDGMENTS, 4, 5; PARTNERSHIP, 6, 9, 10, 13; STATUTE OF FRAUDS; VENDOR AND VENDEE, 16-18.

FRAUDULENT CONVEYANCES.

1. TRANSFER IS FRAUDULENT AGAINST CREDITORS, THOUGH MADE FOR VALUABLE CONSIDERATION, if not made in good faith, but with the intent to hinder, delay, or defraud creditors. *Mills v. Howeth*, 331.
2. PROOF OF VENDEE'S ACTUAL PARTICIPATION IN FRAUD OF VENDOR in sale fraudulent as to creditors is not necessary; knowledge of the fraudulent intent or of facts sufficient to put a prudent man upon inquiry is sufficient. *Id.*
3. VALUABLE CONSIDERATION WILL NOT OF ITSELF RENDER CONVEYANCE VALID under the statute of frauds. It must also be *bona fide*. *Wood v. Chambers*, 382.
4. EMPLOYMENT OF DEBTOR AS AGENT OF TRUSTEE to use and control assigned effects in a manner inconsistent with the purposes of the trust, and as his own, is evidence that the assignment was not made in good faith. *Linn v. Wright*, 282.
5. SALE OF HOMESTEAD PREMISES, NOT LIABLE FOR DEBTS, cannot be regarded as evidence of intent to defraud, hinder, or delay creditors. *Vander v. Freeman*, 391.

6. PURCHASER SEARCHING RECORDS SHOWS INTENT TO GET GOOD TITLE to the land, but does not show that he did not know he was enabling the vendor to defraud his creditors. *Wood v. Chambers*, 382.
 7. PAROL EVIDENCE OF INDEBTEDNESS OF VENDOR IN TRANSFER FRAUDULENT AGAINST CREDITORS is competent, it not appearing that the indebtedness was evidenced by writing. *Mills v. Howeth*, 331.
 8. ALLEGATION THAT CONVEYANCE WAS TO DEFRAUD, HINDER, AND DELAY CREDITORS, made as a defense by a grantee against a grantor, who seeks to have the deed declared a trust, should be supported by evidence that there were creditors at the time of the conveyance. *Vandever v. Freeman*, 391.
 9. AVERMENT OF IGNORANCE OF FRAUD UNTIL TIME WITHIN STATUTORY LIMITATION made by plaintiff in bill to set aside fraudulent conveyance casts the burden upon the defendant to prove the contrary. *Godbold v. Lambere*, 192.
 10. AVERMENT OF IGNORANCE OF FRAUD UNTIL TIME WITHIN STATUTORY LIMITATION is sufficient if made in a manner sufficiently explicit to enable the defendant to meet the issue tendered. *Id.*
 11. REGISTRY OF DEED DOES NOT GIVE NOTICE OF FRAUD IN ITS EXECUTION. *Id.*
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY AND INSOLVENCY; EVIDENCE, 7; HOMESTEADS, 13; HUSBAND AND WIFE, 7; PARTNERSHIP, 6, 9, 10; SURETYSHIP; TRUSTS AND TRUSTEES, 7, 8.

FREIGHT.

See COMMON CARRIERS, 3.

GAMING.

1. GAMING IS PROHIBITED BY STATUTE IN CALIFORNIA. The consideration for a debt contracted thereat is illegal as between the parties, and as to all persons except *bona fide* holders without notice. A check given in payment of such debt is void. *Fuller v. Hutchings*, 746.
2. WHERE ONE GIVES MONEY TO ANOTHER TO BET UPON ELECTION, AND LATTER SO USES IT BY DEPOSITING IT WITH STAKE-HOLDER, this is an illegal act, but the party depositing it may retract his illegal act. The money is not forfeited for the benefit of the stake-holder, but he holds it as bailee of the depositor, who may resume it at any time before it is paid over to the winner. *Hardy v. Hunt*, 787.
3. STAKEHOLDER.—WHERE PRINCIPAL PLACES HIS MONEY IN HANDS OF AGENT TO BET UPON ELECTION, and it is so used by the agent, who deposits it with a stake-holder, where it is attached by the creditors of the agent, and the stake-holder was cited to appear before the justice's court out of which the attachment issued, and knowing the facts, he stated them, whereupon a judgment was rendered that he pay the money over to the creditors, which he did, the principal may maintain an action against the stake-holder for the money, and the judgment of the justice's court is no protection to him, as he should have defended against the same in some manner, interpleaded, or appealed therefrom. *Id.*

See ESTOPPEL, 8.

GAS COMPANIES.

1. GAS COMPANY TO WHICH HAS BEEN GRANTED EXCLUSIVE RIGHT to manufacture and sell gas in a city, to be consumed therein by its citizens, is bound to furnish gas to a citizen who has made all necessary preparations to receive and use the same in his store or residence along the line of the company's pipes, upon his compliance with such reasonable conditions or terms as the company may rightfully impose. *Shepard v. Mil. G. L. Co.*, 479.
2. GAS COMPANY HAS RIGHT TO MAKE SUCH NEEDFUL RULES AND REGULATIONS for its own convenience and security and for the safety of the public as are reasonable and just, and to exact from the consumer a promise of conformity thereto. *Id.*
3. RULE OF GAS COMPANY ALLOWING IT TO DEMAND SECURITY for the gas consumed, or a deposit of money to secure payment therefor, is just, and necessary to guard against loss. *Id.*
4. PERSON IS NOT BOUND, IN ORDER TO ENTITLE HIM TO BE FURNISHED WITH GAS, to subscribe to a rule of the gas company which authorizes it by its inspector to have free access at all times to buildings and dwellings, to examine the whole apparatus, and to remove the meter and service-pipe. Such a regulation is too general, and cannot be upheld. *Id.*
5. RULE RESERVING TO GAS COMPANY RIGHT AT ANY TIME TO CUT OFF COMMUNICATION of the service-pipe, if it shall find it necessary so to do to protect the works against abuse or fraud, is invalid. The company must rely for protection against fraud upon the same tribunals that the law provides for individuals. *Id.*
6. GAS COMPANY HAS NO POWER TO IMPOSE PENALTY for the violation of one of its regulations, nor has it the right to make the submission to such penalty a condition precedent to the right of a citizen to be furnished with gas. *Id.*

GIFTS.

See FRAUD, 4, 5; HUSBAND AND WIFE, 5, 6.

GROWING CROPS.

See INFANTRY, 1; LANDLORD AND TENANT, 3, 13-15; SALES, 1; TROVER, 1.

GROWING TREES.

See HIGHWAYS, 1-3.

GUARANTY.

1. GUARANTOR UPON CONTINUING GUARANTY IS NOT ENTITLED TO NOTICE OF DEFAULT in payment by principal, where he is not prejudiced by the want of it; he stands upon the same footing as any other surety, and his liability is not determined upon the principles applicable to negotiable instruments. *Bank v. Knotts*, 234.
2. INTEREST SHOULD BE ALLOWED ON SUM GUARANTEED FROM TIME OF DEFAULT IN ITS PAYMENT, notwithstanding the suit be against the guarantor only. *Id.*

See STATUTE OF LIMITATIONS, 2.

1. GUARDIAN IS NOT PERSONALLY LIABLE ON CONTRACTS OF WARD without an express undertaking in writing to that effect. *Overton v. Bessers*, 610.
2. GUARDIAN IS NOT LIABLE, EITHER PERSONALLY OR IN FIDUCIARY CHARACTER, FOR NECESSARIES furnished his ward without his consent, express or implied. *Id.*
3. GUARDIAN'S POWERS, AUTHORITY, AND DUTIES CEASE WHEN WARD ATTAINS AGE OF MAJORITY, but the consequences and responsibilities of the relation may continue. *Id.*
4. GUARDIAN'S HAVING PAID WARD'S BOARD AND TUITION ON FORMER OCCASION DOES NOT MAKE HIM RESPONSIBLE, by implication, for board furnished the ward without his consent or authority. *Id.*
5. GUARDIAN MAY CHANGE WARD'S DOMICILE BY ASCENDING TO DEFRACED CREDITORS, leaving his guardianship unsettled, he being the step-father of the ward, and the ward being a member of his family, if there is no fraud as against the ward. *Wheeler v. Hollis*, 363.
6. TO ENABLE GUARDIAN TO ALIENATE WARD'S PROPERTY, he must obtain an order from a court of competent jurisdiction, in a proceeding in which the wards are made parties; an order of sale obtained upon his *ex parte* application is a nullity. *Moore v. Hood*, 210.
7. GUARDIAN IS LIABLE TO ACCOUNT TO WARDS FOR FULL VALUE OF CHATTELS sold, under order of sale obtained upon his *ex parte* application. *Id.*
8. BILL FOR ACCOUNTING LIES AGAINST GUARDIAN APPOINTED IN ANOTHER STATE AND HIS SURETY. *Id.*

HABEAS CORPUS.

1. WRIT OF HABEAS CORPUS CANNOT BE USED TO REVIEW ERRORS AND IRREGULARITIES in proceedings resulting in conviction and sentence. A writ of error is the proper remedy. *Ex parte Shaw*, 55.
2. SENTENCE VOID FOR WANT OF JURISDICTION OVER OFFENSE MAY BE ASSAILED ON HABEAS CORPUS, and the relator discharged. *Id.*
3. HABEAS CORPUS CANNOT BE USED TO ATTACK JUDGMENT OF COURT possessing general jurisdiction in criminal cases. *Id.*
4. QUESTIONS OF DOUBTFUL JURISDICTION SHOULD BE SOLVED BY WRIT OF ERROR, and not by *habeas corpus*. *Id.*
5. SENTENCE FOR SHORTER TERM THAN PERIOD REQUIRED BY LAW IS ERRONEOUS, not void, and cannot be attacked on *habeas corpus*. *Id.*
6. RETURN OF HABEAS CORPUS INTO SUPREME COURT IN TERM TIME RESTS IN DISCRETION of the judge who allowed the same; and the regular business of that court will not be put aside to hear such returns where the judicial system will permit them to be heard in other courts with less delay and inconvenience. *Id.*
7. TO USE HABEAS CORPUS AS WRIT OF ERROR IN ANNULING SENTENCES IS ABUSE which cannot be too soon corrected. *Id.*

HANDWRITING.

See WITNESSES, 3, 4.

HEIRS.

See CO-TENANCY, 3, 4, 6, 7; EJECTMENT, 9; ESTATES OF DESCENDENTS, 2; EXECUTIONS, 23, 24.

HIGHWAYS.

1. ROAD OVERSEER MAY, WITHOUT BECOMING TRESPASSER, GO UPON ADJACENT LAND and take timber trees for road purposes, when the amount taken does not materially injure or impair the value of the land. *Watkins v. Walker County*, 298.
2. OWNER OF LAND IS ENTITLED TO COMPENSATION FROM COUNTY FOR TREES taken from his land by road overseer to repair road. *Id.*
3. ROAD OVERSEER IS LEGALLY CONSTITUTED AGENT of the county from which he receives his appointment, and the county is liable in its corporate capacity for any acts done by him in the proper and necessary exercise of the authority conferred upon him. *Id.*
4. OWNER OF LAND THROUGH WHICH PUBLIC ROAD RUNS may cut a passage across the road for the purpose of draining his land or leading water to his mill, because the land is his own; but in so doing, he must not injure the public easement, and to preserve it, must construct bridges over such ditches where they cross the road, and must keep the same in repair. And a subsequent owner who continues such ditches is bound by such duties, and liable for repair of such bridges. *Woodring v. Forks Township*, 134.
5. PROCEEDINGS BY INDICTMENT, AND FOR STATUTORY PENALTY FOR OBSTRUCTING PUBLIC ROAD, are designed more as punishments for offenses than as remedies for the injury, and will not preclude the public from repairing the road in the first instance, and then bringing actions to recover the cost thereof from the party bound to make repairs. *Id.*
6. TOWNSHIP MAKING REPAIRS TO PUBLIC ROAD may sue the owner of the adjoining land who is liable therefor, notwithstanding the work was done on the credit of the township, and was not actually paid for at the time of suit brought. *Id.*

See CORPORATIONS, 15, 16, 18-22; RAILROADS, 3, 4; WATERCOURSES, 5.

HOMESTEADS.

1. HOMESTEAD NECESSARILY INCLUDES IDEA OF HOUSE OR RESIDENCE of some sort, and the exemption guaranteed by the law and constitution of Texas is based upon the supposition that there is a homestead in fact; a home in which the citizen and his family are or might be domiciled, and that it does not consist of land merely. *Franklin v. Coffee*, 292.
2. WHERE HOME, RESIDENCE, OR SETTLEMENT HAS ONCE BEEN ACQUIRED on lands it is not necessary that there should be continuous actual occupation to secure the homestead from forced sale; an absence temporary in its nature, and not designed as an abandonment, will not work a forfeiture of the right. *Id.*
3. IN ORDER TO SECURE HOMESTEAD EXEMPTION, it is not necessary that a house should be actually built or improvements made upon the land; but there must be a preparation to improve, and of such a character and to such an extent as to manifest beyond doubt an intention to complete the improvements and reside upon the place as a home. *Id.*
4. IF OLD HOMESTEAD CAN BE LOST without proof that a new one has been gained, the circumstances to show abandonment must be most clear and decisive. *Shepherd v. Cassidy*, 372.
5. HOMESTEAD CANNOT BE LOST BY MERE absence of the party or family intended to be benefited. *Id.*

6. **RIGHT TO HOMESTEAD EXEMPTION CANNOT BE REGARDED AS FORFEITED**, except by clear intention of total abandonment. *Id.*
 7. **INTENTION TO ABANDON HOMESTEAD MAY BE CHANGED** any time before a new one is acquired; and however such change is made known, it will be effectual to protect homestead rights. *Id.*
 8. **CONTINUOUS ABANDONMENT OF HOMESTEAD**, up to the time that some opposing right has, by sale, become vested in other parties, must be shown in order that it may be declared forfeited. *Id.*
 9. **URBAN HOMESTEAD IS LIMITED AS TO VALUE, BUT NOT AS TO NUMBER OF LOTS** which it shall embrace, under the Texas constitution. *Pryor v. Stone*, 341.
 10. **HOMESTEAD MAY EXIST IN LOTS NOT CONTIGUOUS** to each other, under the constitution of Texas. *Id.*
 11. **HOMESTEAD IN TEXAS MAY INCLUDE OFFICE OR SHOP** in which the head of a family pursues his business, though it may be on a lot not contiguous to the family residence, if the entire value does not exceed the statutory limit. *Id.*
 12. **TEMPORARY RENTING OF HOMESTEAD LOTS TO OTHERS** is not an abandonment of the homestead. *Id.*
 13. **CONVEYANCE OF HOMESTEAD FOR VALUABLE CONSIDERATION** cannot be deemed a conveyance to defraud creditors, from whose claims there is a permanent enduring exemption. *Wood v. Chambers*, 382.
- See **EXECUTIONS**, 10, 11; **FRAUDULENT CONVEYANCES**, 5; **MORTGAGES**, 14, 15.

HORSES.

See **ANIMALS**, 2-4

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—HUSBAND'S CONTROL OVER JOINT PROPERTY.**—During the coverture, the husband has the same rights and power over real estate conveyed to himself and wife as he has in regard to the wife's individual estate owned by her at the time of her marriage. Without his wife's consent he may transfer such estate, may charge it at law with his debts, and it may be seized and sold by his creditors. But the purchaser acquires no greater estate than the husband, and consequently he holds it subject to the contingent right of the wife, who, in case she survives her husband, becomes absolute owner of the whole estate. So if the husband survives, the purchaser acquires the fee in the whole estate. *Ames v. Norman*, 269.
2. **WHERE HUSBAND AND WIFE ARE JOINTLY SEISED OF REAL ESTATE, PURCHASER THEREOF AT EXECUTION SALE** for the debt of the husband cannot be affected in his title thereto by the subsequent divorce a vinculo of such husband and wife. He holds such property absolutely, subject to the contingency that the wife should outlive her husband, in which case her title attaches in fee. *Id.*
3. **LAND PURCHASED WITH COMMUNITY FUNDS IS PRESUMABLY COMMUNITY PROPERTY**, though the deed is taken in the name of the wife. *Higgins v. Johnson*, 394.
4. **PRESUMPTION THAT LAND IS COMMUNITY PROPERTY**, though standing in the wife's name, may be overcome by proof that the husband, in having the property put in her name, intended to donate it to her. *Id.*

6. CONVEYANCE TO WIFE OF LANDS PURCHASED WITH FUNDS OF HUSBAND is *prima facie* a gift from the latter to the former; but the presumption may be rebutted by proof that the purchase was for his own benefit. *Id.*
 6. PRESUMPTION THAT DEED TO HUSBAND IS CONVEYANCE TO COMMUNITY is much stronger than when the deed is to the wife. *Id.*
 7. CONVEYANCE FROM HUSBAND TO WIFE IS NOT FRAUD on parties subsequently becoming his creditors. *Id.*
 8. EXPRESSIONS IN SMITH v. STRAHAN, 16 Tex. 323, explained and modified. *Id.*
 9. RESULTING TRUST ARISES IN FAVOR OF WIFE whose husband induces her to allow him to sell separate land of hers and to use the money thus derived to purchase other land with, where he takes the title in his own name. A court of equity will enforce the trust after his death against his heirs. Such a trust is not within any of the provisions of the statute of frauds, and may be established by parol. *Pritchard v. Wallace*, 254.
 10. HUSBAND'S ASSIGNMENT OF WIFE'S REVERSIONARY INTEREST ONLY TRANSFERS to the assignee the right which the husband had; and he takes nothing unless the husband survive the wife, or the reversionary chose in action is reduced to possession during coverture. *Needles's Ex'r v. Needles*, 85.
 11. COMPLAINT IN ACTION BY HUSBAND AND WIFE ON PROMISSORY NOTE payable to wife as administratrix must describe plaintiffs as husband and wife at the time the note was given, or must show that they sue as administrator and administratrix, and that the note is assets in their hands; and if they are not so described as husband and wife, but appear to sue as individuals, and there is no allegation to whom the note is payable, a recovery by them will not be authorized. *Milton v. Haden*, 523.
 12. JUDGMENT AGAINST HUSBAND AND WIFE IS NOT NECESSARILY ERRONEOUS, because it may properly be rendered for a debt due by the wife at the time of the marriage. *Ellis v. Clarke*, 603.
- See EXECUTORS AND ADMINISTRATORS, 8, 19; MARRIAGE AND DIVORCE; MARRIED WOMEN; PLEADING AND PRACTICE, 5; VENDOR AND VENDEE, 13.

ILLEGAL CONTRACTS.

See CONFLICT OF LAWS; CONTRACTS, 3, 4.

IMPROVEMENTS.

See ADVERSE POSSESSION, 3; HOMESTEADS, 3; VENDOR AND VENDEE, 14.

INCUMBRANCES.

See CORPORATIONS, 12; SPECIFIC PERFORMANCE, 9, 10.

INDICTMENTS.

See CRIMINAL LAW.

INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS.

INFANCY.

1. INFANCY OF LESSEE CONSTITUTES NO DEFENSE TO TROVER FOR CROPS CONVERTED, brought upon a provision in the lease reserving to the lessor :

lien thereon for the rent; for his liability arises from tort, not from a breach of contract. *Baxter v. Bush*, 429.

2. INFANT'S CONTINUING IN POSSESSION OF LEASED PREMISES during the year after he came of age is a ratification of the tenancy, and renders obligatory upon him the provisions of the lease. *Id.*

See CRIMINAL LAW, 1; EQUITY, 4; PARENT AND CHILD.

INJUNCTIONS.

See CORPORATIONS, 2, 4; EXECUTIONS, 37; MARRIED WOMEN, 4.

INSANITY.

1. MERE WEAKNESS OF MIND DOES NOT INCAPACITATE PARTY FROM CONTRACTING, if he be not *non compos mentis*, but it may be a material circumstance in establishing an inference of unfair practice or imposition. *Ellis v. Mathews*, 353.
2. LUNATIC'S PLACE OF SETTLEMENT IS NOT INVALIDATED OR CHANGED by confinement in an asylum or jail by lawful authority. *Ashland County v. Richland County Infirmary*, 49.
3. CONTRACT OF ONE ACTING WITHOUT AUTHORITY FOR INSANE MORTGAGOR is not obligatory upon him. A decree made pursuant to such a contract may be valid and operative as to innocent third persons, but the purchaser with notice will hold in trust for the insane mortgagor. *Lockwood v. Mitchell*, 78.
4. SUIT TO SET ASIDE CONTRACT OF LUNATIC, IN SOUTH CAROLINA, may be brought in the name of the committee of the lunatic, but it is better to make the lunatic a party, for in this state the maxim that one cannot stultify himself is not recognized. *Sims v. McLure*, 196.
5. EQUITY SETS ASIDE ACTS OF LUNATICS ON GROUND that fraud has been practiced upon them. *Id.*
6. BILL TO SET ASIDE CONTRACTS OF LUNATIC should state facts impeaching each contract sought to be avoided. *Id.*
7. LUNATIC IS BOUND BY CONTRACTS MADE BEFORE INQUISITION OF LUNACY, where no undue advantage has been taken of him, and where evidences of his mental unsoundness were not so manifest as necessarily to give notice of his incompetency to contract. *Id.*
8. CONTRACTS OF LUNATICS MADE AFTER TIME AT WHICH INQUISITION FINDS UNSOUNDNESS TO BEGIN are *prima facie* void; but the inquisition is not conclusive evidence of mental unsoundness. *Id.*

See MARRIAGE AND DIVORCE, 1-4; USURY, 3.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See AGENCY, 1; CRIMINAL LAW, 11; EXECUTIONS, 3; EXECUTORS AND ADMINISTRATORS, 1, 2; FRAUD, 3; PLEADING AND PRACTICE, 26-33.

INSURANCE.

See CORPORATIONS, 3.

INTEREST.

See COMMON CARRIERS, 12; GUARANTY, 2; JUDGMENTS, 22; NOTARIES, 7; PARTNERSHIP, 25, 26; SET-OFF; USURY.

INTERPLEADER.

1. DEFENDANT IS NOT ALLOWED PLEA OF INTERPLEADER, under chapter 17, section 38, of the Arkansas digest. *Ellis v. Clarke*, 603.
2. SHERIFF MAY FILE BILL OF INTERPLEADER AGAINST JUDGMENT CREDITORS to have their respective priorities and rights determined in the fund arising from the sale of the same property of a debtor under all of several executions. *Lawson v. Jordan*, 596.
3. BILL OF INTERPLEADER IS NOT DEMURRABLE ON GROUND OF WANT OF PRIVITY AMONG PARTIES DEFENDANT, one of whom claims three shares of stock in complainant's bank under an attachment against the person in whose name they stand, the second of whom claims two of the shares under an assignment of all three for the benefit of creditors, and the third of whom claims the remaining share under a sale to him by the assignee. *Providence Bank v. Wilkinson*, 160.
4. DEFENDANT TO BILL OF INTERPLEADER CANNOT DEMUR ON GROUND THAT HE IS NO PARTY TO ANY SUIT, and has no interest in any suit pending between the other parties to the bill, when the bill alleges that he threatens suit against the complainant as claimant of part of the property, and a suit for the remainder of the property is pending by one who claims under him against the complainant. *Id.*
5. OBJECTION OF ADEQUATE REMEDY AT LAW IS NOT AVAILABLE AGAINST BILL OF INTERPLEADER that states a proper case for interpleading; the forum in which the parties shall litigate under the bill, whether at law or in equity, is a matter of after consideration. *Id.*
6. EQUITY TAKES CARE, UPON BILL OF INTERPLEADER, that no right or equitable privilege of trial is lost to any party by its interference; therefore a bill of interpleader is not demurrable on the ground that it produces confusion by the change of the forum from law to equity, and deprives the demurrant of his witnesses by making them parties. *Id.*

INVENTIONS.

See COMMON CARRIERS, 2.

ISSUE.

See CONTRACTS, 5.

JOINT TENANCY.

See CO-TENANCY, 2.

JUDGMENTS.

1. JUDGMENT MAY BE AMENDED NUNC PRO TUNC at a subsequent term, as as to show that a nonsuit was set aside on payment of costs, where the trial docket shows an entry in the handwriting of the presiding judge that "plaintiff takes a nonsuit, which is set aside on payment of costs." *Sims v. Boynton*, 540.
2. JUDGMENT OF COMPETENT TRIBUNAL IS CONCLUSIVE upon matters actually determined, and also upon matters which the parties might have litigated in the case. *Ellis v. Clarke*, 603.
3. COURT HAVING JURISDICTION TO RENDER DECREE, it is conclusive as to the questions adjudicated therein, and cannot be reopened to examination or discussion unless obtained by fraud. *Grassmeyer v. Benson*, 309.

4. WHETHER DECREE IS OBTAINED BY FRAUD or not, a party in interest may acquiesce in and abide by it, and after a space of fifteen years a stranger, not a party or privy, nor claiming under a party in interest, cannot impeach it, especially when there is no evidence of fraud requiring the court to leave that question to the jury. *Id.*
5. PROOF MUST BE PRODUCED TO WARRANT COURT IN SETTING ASIDE JUDGMENTS, and annulling titles to land on the ground of fraud. It must not be done upon mere surmise or suspicion, nor upon evidence which does not necessarily, naturally, and reasonably tend to that conclusion. *Id.*
6. JUDGMENT OF PARTICULAR COURT ON MERITS, WHERE MADE FINAL BY STATUTE, cannot be drawn in question in another court in a proceeding different from the statutory mode. *Commonwealth v. Garrigues*, 103.
7. DECREE FOR SALE OF PROPERTY TO ENFORCE MECHANICS' LIEN has, in California, the same effect upon rights of purchasers and incumbrancers prior to the commencement of suit that a similar decree would have upon the foreclosure of a mortgage. *Whitney v. Higgins*, 748.
8. PERSON ACQUIRING INTERESTS BY CONVEYANCE OR INCUMBRANCE AFTER SUIT BROUGHT to enforce a mortgage or mechanics' lien is bound by the decree, and need not be made a party. *Id.*
9. PARTIES AND PRIVIES ARE ALONE BOUND BY JUDGMENT; a party cannot be affected by a suit to which he is a stranger. *Id.*
10. JUDGMENT LIEN IS EXTINGUISHED BY SALE OF PREMISES UNDER PRIOR LIEN, followed by a conveyance from the sheriff. *McMillan v. Richards*, 655.
11. LIEN OF JUDGMENT CANNOT BE EXTENDED BY EXECUTION OR LEVY. It can only be continued by *scire facias*. *Lawson v. Jordan*, 596.
12. ISSUANCE AND LEVY OF EXECUTION BEFORE EXPIRATION OF JUDGMENT LIEN will not have the effect of prolonging the lien beyond the two years limited by section 204 of the code of California. Both the levy and sale must be made within the time limited by the act. *Isaac v. Swift*, 698.
13. CODE HAVING EXPRESSLY LIMITED EXISTENCE OF JUDGMENT LIEN to two years, a continuance beyond that time will not be presumed. *Id.*
14. WHERE EXECUTION SALE IS NOT PREVENTED by some legal impediment, the judgment lien expires at the end of two years, under section 204 of the California code. *Id.*
15. JUDGMENTS AND THEIR LIENS ARE UNAFFECTED BY DELIVERY BONDS BEING TAKEN AND FORFEITED, where such bonds do not, upon forfeiture, operate as judgments, and therefore extinguish the original judgments. *Lawson v. Jordan*, 596.
16. JUDGMENT LIEN IS NOT AFFECTED BY ORDER TO RETURN PROCESS, without sale. *Id.*
17. JUDGMENT LIENS ARE ENFORCED IN EQUITY IN SAME MANNER AS AT LAW. *Id.*
18. ACTION OF DEBT ON JUDGMENT is properly brought in the county where the defendant resides. *Townsend v. Smith*, 400.
19. LEVY UPON LAND IS NOT SATISFACTION OF JUDGMENT. *Id.*
20. VOID SALE OF LAND UNDER EXECUTION is not a satisfaction of the judgment, where purchased by the judgment creditor, and afterwards recovered back by the judgment debtor. *Id.*
21. JUDGMENT IS NOT AFFECTED BY EXECUTION SALE THAT PASSES NO TITLE, and after such a sale may be the subject of an action of debt, without a *scire facias* to revive it. *Id.*

22. JUDGMENT BEARS EIGHT PER CENT INTEREST, regardless of the rate on the original indebtedness. *Id.*

See BANKRUPTCY AND INSOLVENCY; CONFLICT OF LAWS, 1; CO-TENANCY, 8, 9; COUNTIES; DETINUE, 5; EJECTMENT, 9; EXECUTIONS; HUSBAND AND WIFE, 12; INSANITY, 3; INTERPLEADER, 2; JUDICIAL SALES, 2, 3; MORTGAGES, 9; NEW TRIAL; PARTNERSHIP, 12; REPLEVIN; SPECIFIC PERFORMANCE, 1.

JUDICIAL SALES.

1. NOTICE OF JUDICIAL SALE is notice of preceding proceedings therein. *Alexander v. Miller's Ex'rs*, 314.

2. COMMISSIONER'S SALE OF LAND UNDER DECREE OF CHANCERY COURT will be set aside where made on a day so inclement that persons intending to bid for a part of the land are deterred from attending, and where there was but one bidder present who lived at the place, without weighing the evidence, which is conflicting, as to the sufficiency of the price at which it was sold. *Roberts v. Roberts*, 435.

3. IT IS NOT NECESSARY, ON OBJECTION TO COMMISSIONER'S SALE OF LAND, in Virginia, to ask that the biddings may be opened, by the offer of a substantial advance upon the price reported. The court will consider the objections to the sale, and confirm or set it aside as the merits of the case may require. *Id.*

See AUCTIONS; EXECUTORS AND ADMINISTRATORS, 10, 12; PROBATE COURTS; STATUTES.

JURISDICTION.

1. SECTION 4 OF ARTICLE 6 OF CALIFORNIA CONSTITUTION construed to give the state supreme court appellate jurisdiction in all cases; provided that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed two hundred dollars in value or amount, unless the legality of a tax, toll, impost, or municipal fine is drawn into question. *Conant v. Conant*, 717.

2. JUDGES OF COURT OF COMMON PLEAS IN OHIO ARE JUDGES OF DISTRICT COURT, under the constitution and laws of that state, and as such are empowered to exercise its authority. *Hollister v. Judges of District Court*, 100.

See CORPORATIONS, 2; EXECUTIONS, 25; HABEAS CORPUS; MARRIAGE AND DIVORCE, 10; MORTGAGES, 10; PLEADING AND PRACTICE, 3, 22; PROBATE COURTS, 1, 2; SPECIFIC PERFORMANCE, 1-3.

JURY AND JURORS.

COURT IS NOT REQUIRED TO BE ACTIVE IN ASSIGNING STRUCK JURY, and is not bound to grant one on demand of the parties, unless such demand be made before the organization of the jury is commenced. *McArthur v. Carrie's Adm'r*, 529.

See DAMAGES, 2, 3; EXECUTIONS, 31; EXECUTORS AND ADMINISTRATORS, 1; FRAUD, 2; NEGLIGENCE; PLEADING AND PRACTICE, 26-33; SALES, 5.

JUSTICES OF THE PEACE.

See PLEADING AND PRACTICE, 22.

LANDLORD AND TENANT.

1. COVENANT IN LEASE TO LESSEES, "THEIR HEIRS AND ASSIGNS," that in the event of a sale by the lessor the lessees should have the refusal of the property, is a covenant running with the land. *Laffan v. Naglee*, 678.
2. COVENANT IN LEASE, RELATING TO THING DEMISED, attaches to the land, and runs with it. *Id.*
3. LESSOR'S TITLE TO CROPS UNDER LEASE, RESERVING TO HIM LIEN UPON THEM FOR RENT, is not affected by his taking, at the making of the lease, the lessee's note, with a surety, for the rent, or by his prosecuting an action upon the note; and he may sue in trover for the crops. *Baxter v. Bush*, 429.
4. ACCEPTANCE BY LANDLORD OF RENT FROM TENANT ACCRUING AFTER FORFEITURE operates as a waiver of the breach of the condition of a lease. *Gomber v. Hackett*, 467.
5. YEARLY TENANT HOLDING OVER AFTER EXPIRATION OF TERM IS PRESUMED TO HOLD UNDER RENEWAL OF LEASE if there be no evidence to the contrary, and is presumed to hold for the time and on the terms of the original lease. *Crommelin v. Thiess*, 499.
6. PRESUMPTION OF RENEWAL OF LEASE BY TENANT MERELY HOLDING OVER IS REBUTTED by proof of a new contract materially different from the original lease, and this, notwithstanding the new contract, is void by the statute of frauds, because verbal, and not to be performed within a year from the making thereof. *Id.*
7. PAROL AGREEMENT FOR LEASE IS VOID if for one year and the term is to commence at some future day. *Id.*
8. YEARLY TENANT HOLDING OVER AFTER EXPIRATION OF TERM IS TENANT AT WILL, when there is a void parol agreement for a lease differing materially from the terms of the original lease, and such tenancy may be terminated at any time by the tenant quitting the premises, or by the landlord's demand for possession. *Id.*
9. TENANT AT WILL IS LIABLE FOR RENT ONLY DURING ACTUAL OCCUPATION, in an action for use and occupation after the tenant has quit the premises; but if during the occupation the landlord brings a real action, he may recover damages for use and occupation to the time of the verdict. *Id.*
10. TENANT MAY SUBLET LEASED PREMISES when the lease contains no stipulation against subletting, and the property may be used for any purpose not inconsistent with the terms of the lease. *Id.*
11. TENANT IS EXONERATED FROM LIABILITY TO PAY RENT BY ANY INTERFERENCE BY LANDLORD which deprives the tenant of the right of enjoyment of the premises to the full extent guaranteed by the lease, and for such interference the tenant may abandon the premises. *Id.*
12. TENANT UNDER LEASE OF LATER DATE THAN JUDGMENT OR OTHER LIEN, after a sheriff's sale under such lien, becomes a tenant at will of the sheriff's vendee, and if such tenant has sown his crop before he was notified of the purchaser's intention to determine the tenancy, he will be entitled to take it away. *Bittinger v. Baker*, 154.
13. PERSON IN POSSESSION OF LAND UNDER TITLE WHICH MAY BE DETERMINED by happening of uncertain event, not within his control, is on such determination of his lease entitled to the way-going crop. *Id.*
14. LESSEE IN POSSESSION AT TIME OF SHERIFF'S SALE OF PREMISES is to be treated either as a tenant for years or at will: if for years, he is entitled

to the way-going crop, under the general custom or common law of Pennsylvania; if at will, he has the right to the larger emblements or way-going crop that belongs by the common law to that species of tenancy. *Id.*

15. CASES ON WAY-GOING CROPS REVIEWED. *Id.*

See ESTOPPEL, 10; INFANCY; TROVER, 1; VENDOR AND VENDEE, 2.

LARCENY.

See CRIMINAL LAW, 11-13.

LAW OF THE CASE.

See PLEADING AND PRACTICE, 32.

LAWS.

See CONFLICT OF LAWS.

LEASES.

See LANDLORD AND TENANT; PARTNERSHIP, 22.

LEGACY.

See MARRIED WOMEN, 1-3.

LETTERS.

See MAILS.

LETTERS OF ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS, 1.

LEVY.

See ATTACHMENTS; EXECUTIONS, 14; JUDGMENTS, 11, 12, 13.

LEX DOMICILII.

See ESTATES OF DECEDENTS, 1.

LEX FORI.

See CONFLICT OF LAWS.

LEX LOCI CONTRACTUS.

See CONFLICT OF LAWS.

LICENSE.

See FERRIES.

LIENS.

See ATTACHMENTS, 3, 4; JUDGMENTS, 7, 8, 10-17; LANDLORD AND TENANT, 3, 12; MORTGAGES, 1, 9, 18, 20; PARTNERSHIP, 3, 4; PLEADING AND PRACTICE, 2; TROVER, 1; VENDOR AND VENDEE, 1, 3.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES.

See DAMAGES, 1.

LIS PENDENS.

See NOTICE.

LOST GOODS.

See CRIMINAL LAW, 12.

LUNACY.

See INSANITY.

MAILS.**LETTER PROPERLY MAILED AND DIRECTED IS PRESUMED TO HAVE BEEN RECEIVED.** *Russell v. Buckley*, 167.

See NEGOTIABLE INSTRUMENTS, 4.

MALICE.

See CORPORATIONS, 13, 18.

MANDAMUS.

1. **SHERIFF MAY BE COMPELLED BY MANDAMUS** to execute a writ of restitution in an action of forcible entry and detainer. *Fremont v. Orinpa*, 711.
2. **TO SUPERSEDE REMEDY BY MANDAMUS**, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application. *Id.*
3. **REMEDY BY MANDAMUS IS NEITHER SUPERSEDED** by remedy by criminal prosecution nor action on the case for neglect of duty, as neither of the latter can compel a specific act to be done, and are therefore not equally convenient, beneficial, and effectual. *Id.*
4. **MANDAMUS TO COMPEL SHERIFF TO EXECUTE DEED TO REDEMPTIONER** may be brought in the county where the relator resides. *McMillan v. Richards*, 655.
5. **OBJECTION THAT WRIT OF MANDAMUS IS DIRECTED TO PERSONS AS JUDGES** of the district court, instead of to the district court, is untenable. *Hollister v. Judges of District Court*, 100.
6. **WRIT OF MANDAMUS DIRECTED TO SUBORDINATE JUDICIAL TRIBUNAL IS PROPERLY DIRECTED** to the judge or judges of such court, especially where there may be other judges authorized to hold or participate in holding the court, as authority is exercised over the judges personally in case of disobedience. *Id.*

See COUNTIES, 2.

MARKET OVERT.

See SALES, 4.

MARRIAGE AND DIVORCE.

1. **MARRIAGE IS CIVIL CONTRACT, AND MAY BE AVOIDED, LIKE OTHER CONTRACTS**, for want of sufficient mental capacity in the parties. If at the time of attempting to contract the mind is unsound, it is incapable of that consent which is necessary to the validity of the contract. *Cole v. Cole*, 275.

2. **MENTAL UNSOUNDNESS TO AVOID MARRIAGE CONTRACT MUST BE CLEARLY SHOWN**, and must be sufficient in degree, as it is not every unsoundness that will avoid the contract. *Id.*
3. **IT IS DIFFICULT TO DETERMINE DEGREE OF MENTAL INCAPACITY DISABLING ONE FROM CONSENTING** to the contract of marriage. The general test is the fitness of the person to be trusted with the management of himself and his own concerns. Such a person has a disposing, contracting mind, although it may be in a degree impaired. *Id.*
4. **LUNATIC ON REGAINING HIS REASON MAY AFFIRM MARRIAGE** celebrated while he was insane, and no new solemnization is necessary. *Id.*
5. **WHERE NO CAUSE IS ASSIGNED NOR EXPLANATION OFFERED FOR DESERTION** of the husband by the wife, who is suing for divorce, it is legally inferred that she is guilty of willful desertion. *Conant v. Conant*, 717.
6. **CALIFORNIA STATUTE HAS SPECIFIED CERTAIN ACTS or offenses** which shall constitute grounds of divorce. These are equally pleadable in bar, the one to the other, within the principle of the doctrine of recrimination. *Id.*
7. **TO BAR ACTION OF DIVORCE ON GROUND OF DESERTION** by plaintiff, it must exist for two years, under the California statute, and the court cannot fix a period other than that designated; still, such desertion for less time than the statutory period furnishes a proper subject for consideration in determining the character of divorce to be granted. *Id.*
8. **TO OBTAIN DIVORCE A VINCOULO MATRIMONII**, the applicant must be an innocent party without reproach, and however guilty the defendant, if the applicant is chargeable either with similar guilt or an offense to which the law attaches similar consequences, the relief must be denied; and if the applicant, though not thus guilty, is still not blameless, relief must be limited to a divorce *a mensa et thoro*. *Id.*
9. **ALLEGATIONS IN COMPLAINT CHARGING ADULTERY** ought to state with reasonable certainty the time and place of its commission; but defendant, by failing to demur, waives his objection so far as want of specification of acts constituting the charge is concerned. *Id.*
10. **SUPREME COURT POSSESSES APPELLATE JURISDICTION IN DIVORCE proceedings**, though they do not involve questions of property. *Id.*
11. **IN ACTION FOR PARTITION OF COMMUNITY PROPERTY**, PARTIES HAVING BEEN DIVORCED, it appeared that the defendant was in possession of the lots sought to be partitioned, under a defective title, prior to his marriage with plaintiff, and that after marriage he purchased the lots with common funds, and took a warranty deed therefor: *Held*, that the lots were community property and should be divided, and that defendant having purchased the lots with common funds, and taken a warranty deed therefor, he was estopped to deny that he acquired a good title by the purchase. *Johnson v. Johnson*, 774.

See HUSBAND AND WIFE, 2.

MARRIED WOMEN.

1. **DEVISE OR BEQUEST TO MARRIED WOMAN MUST BE HELD TO CREATE SEPARATE ESTATE** if intent to exclude marital right of husband can be fairly deduced from the language used.

Martin v. Bell, 201.

2. **TESTATOR MAY GIVE PROPERTY TO DAUGHTER**, and secure it from liability for her husband's debts, notwithstanding the general rule that in testamentary dispositions of property the incidents of the property cannot be taken away. *Id.*
 3. **DEVISE OR BEQUEST TO TESTATOR'S DAUGHTERS** declaring that the property "shall in no wise be subject to the debts of their husbands, in no case whatsoever," creates a separate estate in the daughters. *Id.*
 4. **SHERIFF MAY BE ENJOINED FROM SELLING**, under an execution against the husband, real property belonging to the wife. *Alverson v. Jones*, 689.
 5. **WIFE MAY, AS SOLE TRADER**, acquire property by purchase during the marriage, under the California act defining the rights of husband and wife. This right exists only as an exception to the general rule as laid down in section 2 of that statute. *Id.*
 6. **SALE AND DEED OF REAL PROPERTY BY SHERIFF**, under an execution against the husband, conveys to the purchaser a *prima facie* title which the wife has to overcome by proof; such sale and deed is therefore a cloud upon her title. *Id.*
- See **EXECUTORS AND ADMINISTRATORS**, 8; **HUSBAND AND WIFE; MARRIAGE AND DIVORCE**; **NOTARIES**, 1; **PLEADING AND PRACTICE**, 5.

MASTER AND SERVANT.

See **AGENCY**, 2.

MAXIMS.

WHERE LOSS MUST FALL ON ONE OF TWO INNOCENT PERSONS, it should be borne by him whose accident was the cause of it. *Beach v. Schoff*, 122.
See **ESTOPPEL**, 4; **INSANITY**, 5.

MAYHEM.

See **DAMAGES**, 2.

MEASURES.

See **CONSTITUTIONAL LAW**, 5; **WEIGHTS AND MEASURES**.

MECHANICS' LIENS.

See **JUDGMENTS**, 7, 8.

MERGER.

THOUGH PROMISSORY NOTE NOT UNDER SEAL MAY NOT BE MERGER OF CONTRACT for which it was given, yet the payee cannot recover on the original consideration, if his recovery on the note is defeated by proof of a material alteration by him, without the assent of the maker, the effect of which was to render the note void. *White v. Hass*, 548.

MILLERS.

See **BAILMENTS**.

MINING LANDS.

See **EXECUTIONS**, 12.

MINORS.

See INFANCY.

MISTAKE.

IGNORANCE OF FACTS, OF WHICH IGNORANCE PARTY WAS AWARE, does not constitute a mistake of facts. *McDaniels v. Bank of Rutland*, 406.

See ATTACHMENTS, 5; EQUITY; ESTOPPEL, 2; NEW TRIAL, 1; PROBATE COURTS, 5, 6; TRESPASS, 3.

MONEY.

See CORPORATIONS, 2-4.

MONUMENTS.

See BOUNDARIES.

MORTGAGES.

1. EQUITY DOCTRINE AS TO MORTGAGE is that it is a mere security for a debt, passes only a chattel interest, and constitutes simply a lien or incumbrance on the land. *McMillan v. Richards*, 655.
2. EQUITY OF REDEMPTION IS REAL AND BENEFICIAL ESTATE in land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage. *Id.*
3. EQUITY DOCTRINES RESPECTING MORTGAGES HAVE BEEN ADOPTED and asserted by the courts of California. *Id.*
4. PAYMENT OF DEBT EXTINGUISHES MORTGAGE which is security for it. *Id.*
5. FORECLOSURES OF MORTGAGES, IN ENGLISH SENSE, by which the mortgagor, after default, is called upon to repay by a specified day, or be forever barred of his equity of redemption, are unknown to our law. *Id.*
6. EFFECT OF FORECLOSURE SUIT is merely to ascertain the amount due, and to obtain a decree directing the sale of the premises for its satisfaction. *Id.*
7. STATUTORY RIGHT OF REDEMPTION APPLIES TO SALES UNDER DECREES IN MORTGAGE CASES the same as to sales under ordinary judgments at law. *Id.*
8. MORTGAGOR RETAINS ESTATE AFTER FORECLOSURE and until consummation of sale by conveyance, which, when executed, will take effect from the date of the mortgage. *Id.*
9. MORTGAGOR'S ESTATE, AFTER FORECLOSURE SALE and before conveyance to purchaser, is subject to the lien of a judgment against the mortgagor. *Id.*
10. ENFORCEMENT OF CHATTEL MORTGAGE IN FOREIGN JURISDICTION.— Chattel mortgagee holding valid and legal chattel mortgage by the state law in force where he obtained it may enforce it in the courts of Ohio, even against a purchaser without notice of the mortgage, where the property, before breach of condition, has been removed to Ohio, and beyond the jurisdiction of the state in which the mortgage was given. *Kanaga v. Taylor*, 62.
11. OBJECT OF REGISTRY LAWS IN REQUIRING CHATTEL MORTGAGES TO BE RECORDED at the place of the transaction, or where the mortgagor may reside, is to convey notice to others who may wish to become interested as purchasers or lien-holders in the same property. *Id.*

12. **NEW REGISTRATION OF CHATTEL MORTGAGE, IN OTHER TOWNSHIPS, OR IN OTHER STATES, IS NOT REQUIRED** where a legal registration at the time, and in the place and manner pointed out by the law of the place of the transaction or residence of the mortgagor, has given validity to the contract; because when that act is done, the whole duty in regard to the contract is at an end, although the property be removed, before condition broken, into a foreign jurisdiction. *Id.*
 13. **NEW YORK LAW OF CHATTEL MORTGAGES IS IN HARMONY WITH LAW OF OHIO** upon the subject, and effect will be given to it in the latter state. *Id.*
 14. **ONE WHO ADVANCES MONEY TO PAY OFF MORTGAGE** given to secure payment of purchase money on a homestead, and who takes a new mortgage from the husband alone for the money advanced, is, upon the death of the mortgagor, entitled to all of the rights of the first mortgagee. *Carr v. Caldwell*, 740.
 15. **MONEY ADVANCED TO PAY MORTGAGE FOR PURCHASE PRICE OF HOMESTEAD** is equivalent to so much purchase money, and the second mortgagee is in equity entitled to be subrogated to the rights of the first. *Id.*
 16. **DEMAND TO BE SUBROGATED TO FORMER MORTGAGEE'S LIEN** against the estate of a deceased person, the title to such estate being in some one else, is not a claim against the estate within the meaning of the statute, and suit to enforce such demand is properly brought in the state district court. *Id.*
 17. **PARTIES TO FORECLOSURE SUIT IN WHICH JUDGMENT IS RENDERED** under which sale is made are restricted to the statutory period of six months in which to redeem. Their rights, after decree, depend entirely upon the statute, and they have no equity. Such is also the case with parties acquiring interests pending suit to enforce previously existing claims; they take in subordination to any decree which may be rendered, as do those whose interests are acquired after judgment docketed or sale made. *Whitney v. Higgins*, 748.
 18. **EFFECT OF FORECLOSURE SALE SUBORDINATE TO PRIOR CONTRACT.**—A contract was made by which it was stipulated that a foreclosure and sale should be had; that such sale should not operate as a satisfaction, nor divert the lien; that the purchase money should not be applied to pay the mortgage debt; and that the purchaser should take the land in trust to sell, and thus pay off the mortgage debt: *Held*, that the decree and sale made pursuant to such contract must be regarded as part of the contract, and subordinate to it. *Lockwood v. Mitchell*, 78.
 19. **PARTIES ACQUIRING INTERESTS SUBSEQUENT TO PLAINTIFF IN FORECLOSURE SUIT**, and before its commencement, who are not made parties, possess both an equitable and the statutory right to redeem. *Whitney v. Higgins*, 748.
 20. **MORTGAGEE BECOMING PURCHASER FOR LESS THAN JUDGMENT HAS LIEN** upon the property prior to that of the redemptioner for the balance unpaid. *McMillan v. Richards*, 655.
- See ATTACHEMENTS, 4; CONFLICT OF LAWS, 2; EXECUTIONS, 36; INSANITY, 3; PLEADING AND PRACTICE, 2; USURY, 3; VENDOR AND VENDEE, 1.**

MOTIONS.

See PLEADING AND PRACTICE, 19.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 5-22; HIGHWAYS, 6; OFFICES AND OFFICERS; POOR-LAWS.

MURDER.

See CRIMINAL LAW, 14-16.

NAVIGATION.

See COMMON CARRIERS, 1; USAGES; WATERCOURSES.

NECESSARIES.

See GUARDIAN AND WARD, 2.

NEGLIGENCE.

WHAT FACTS AND CIRCUMSTANCES CONSTITUTE EVIDENCE OF CARELESSNESS is a question of law for the courts. But what particular weight will be given to these facts and circumstances is a matter for the jury. *Gerke v. Cal. S. N. Co.*, 650.

See ANIMALS, 2-4; BAILMENTS; COMMON CARRIERS; CORPORATIONS; EXECUTORS AND ADMINISTRATORS, 17; NEGOTIABLE INSTRUMENTS, 4; NOTARIES, 4-6, 10; OFFICES AND OFFICERS, 1; RAILROADS; SPECIFIC PERFORMANCE, 6, 7; WATERCOURSES, 5.

NEGOTIABLE INSTRUMENTS.

1. ONLY INSTRUMENTS WHICH ARE TRANSFERABLE BY DELIVERY ARE BILLS and notes payable to bearer, or payable to order, and indorsed in blank. *Ross v. Smith*, 327.
2. POSSESSION OF NOTE PAYABLE TO ORDER BUT NOT INDORSED BY PAYEE is not sufficient evidence of title to sustain an action on the note by one not payee. *Id.*
3. INDORSEMENT OF FIRST OF SET OF BILLS OF EXCHANGE carries with it the second and third. Either of the set may be presented for acceptance, and if not accepted, upon due notice, a right of action arises against the indorser. *Walsh v. Blatchley*, 469.
4. DELAY OF MAIL IS GOOD EXCUSE FOR NOT IMMEDIATELY PRESENTING bill of exchange for acceptance, and its immediate presentation after arrival is sufficient to charge the indorser. *Id.*
5. INDORSEE OF BILL OF EXCHANGE MAY DECLARE ON FIRST OF SET, and produce in evidence on the trial the second duly presented and dishonored. *Id.*
6. INDORSER OF NOTE BEFORE NEGOTIATION THEREOF BY PAYEE is liable to the payee if it can be proved that the object of the indorsement was to give the maker of the note credit with the payee; and on proof of such fact, the indorser would be liable in a similar manner to the indorsee of the payee, and either may write over such indorser's signature, an agreement corresponding with such facts. *Barto v. Schmeck*, 145.
7. IN ABSENCE OF EXTRINSIC PROOF TO CHARGE IRREGULAR INDORSER, his liability is measured by his indorsement solely, and he is not liable to the payee at all, and only liable to subsequent indorsees by the payee assuming the position of first indorser, and negotiating the note on the credit of all the parties to it. *Id.*

8. CHECK TRANSFERRED AFTER DISHONOR IS TAKEN SUBJECT TO ALL DEFENSES which existed when in the hands of the first holder. *Fisher v. Hutchings*, 746.
 9. PRESUMPTION IS THAT CHECK IS GIVEN UPON VALID CONSIDERATION, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Id.*
- See ALTERATION OF INSTRUMENTS; HUSBAND AND WIFE, 11; MERGER; PARTNERSHIP, 9, 10, 15-21; PLEADING AND PRACTICE, 24.

NEW TRIAL.

1. SURPRISE IS NOT GROUND FOR NEW TRIAL when based upon ignorance of law. *Fuller v. Hutchings*, 746.
2. WHERE THERE IS SOME EVIDENCE TO SUPPORT VERDICT OF JURY, the court should not reverse the judgment because the proof is not, in its opinion, sufficient to justify the finding of the jury. *Dexter v. Cole*, 465.

NONSUIT.

See COMMON CARRIERS, 2; JUDGMENTS, 1.

NOTES.

See NEGOTIABLE INSTRUMENTS.

NOTARIES.

1. NOTARY PUBLIC HAS NO POWER, AFTER HE HAS TAKEN ACKNOWLEDGMENT OF MARRIED WOMAN, made his certificate on the deed, and after the deed has been recorded, to amend his former certificate, or to file a new one stating that he had examined such married woman separate and apart from her husband. *Bours v. Zachariah*, 780.
2. CERTIFICATE OF NOTARY PUBLIC IS NOT ACT IN PARS which may be made, by virtue of his office, at any time during his term of office. The taking of the acknowledgment and the making of the certificate constitute but one transaction, and this being done, the notary's powers are exhausted. *Id.*
3. CERTIFICATE OF NOTARY WHICH FAILS TO STATE that the party acknowledging was known to him, or was identified, is worthless either for the purpose of admitting the instrument in evidence without further proof or to entitle it to be recorded. *Fogarty v. Finlay*, 714.
4. NEGLIGENCE OF NOTARY TO CERTIFY THAT PARTY ACKNOWLEDGING is known to him, or was identified, is not excused by the fact that the certificate was partially filled by the attorney for the grantee. *Id.*
5. NOTARY WHO AFFIXES HIS OFFICIAL SIGNATURE and seal to a certificate of acknowledgment without examining it, to find whether the facts certified are true, is guilty of negligence, and liable on his official bond for damages arising therefrom. *Id.*
6. NOTARY, BY ACCEPTING OFFICE, HOLDS HIMSELF OUT to the world as a person competent to perform the duties connected therewith. He contracts with those who may employ him that he will perform them with integrity, diligence, and skill. Therefore a party cannot be charged with knowledge of a defect in a notary's certificate from having received the

conveyance from the notary and retained it for some time in his possession. *Id.*

7. MEASURE OF DAMAGES IN ACTION AGAINST NOTARY for his omission to state in his certificate of acknowledgment of a mortgage that the party acknowledging was known to him, or was identified, is the amount of the debt and interest intended to be secured by the mortgage. *Id.*
8. CONDITION IN NOTARY'S BOND that he will "well and truly perform and discharge the duties of a notary according to law" embraces every act which he is authorized or required by law to do in virtue of his office. *Id.*
9. CERTIFICATE OF NOTARY IS PRIMA FACIE EVIDENCE of the facts therein set forth, under the California statute. *Id.*
10. NOTARY OMITTING TO STATE IN HIS CERTIFICATE that the party acknowledging was known to him, or identified, is guilty of gross and culpable negligence; and is liable on his official bond to the party injured for all damages resulting from such negligence. *Id.*

NOTICE.

1. LIS PENDENS.—The doctrine of *lis pendens* is that any interest acquired in the subject-matter of a suit while it is pending will be regarded as a nullity as to the plaintiff's title, which may be established by a judgment or decree in the suit. *Shelton v. Johnson*, 265.
 2. DOCTRINE OF LIS PENDENS HAS NO EXTRATERRITORIAL OPERATION; and consequently the pendency of a suit involving the title to certain property in one estate is no notice to a purchaser of said property living in another state to which it has been removed. *Id.*
 3. PRESUMPTION OF LAW STATED IN BOOKS, THAT "LIS PENDENS IS NOTICE TO ALL THE WORLD," must be limited in its construction to all persons within the jurisdiction or state where the suit is pending. *Id.*
 4. PROVISION IN FEDERAL CONSTITUTION THAT "FULL FAITH AND CREDIT SHALL BE GIVEN in each state to the public acts, records, and judicial proceedings of every other state" does not extend the application of the doctrine of *lis pendens* beyond the limits of the state where the suit is pending; it does not mean that all the effects and consequences of a litigation in one state shall follow it to another. *Id.*
 5. REGISTRATION OF DEED MADE AFTER TIME PRESCRIBED IN REGISTRY ACT TAKES EFFECT AS NOTICE from the date of registration, and does not relate back to the day of delivery, but gives to the deed priority over all conveyances made subsequent to the registration. *Leger v. Doyle*, 240.
- See AGENCY, 2, 9; ASSIGNMENTS OF CONTRACTS, 2; ATTACHMENTS, 4; BONA FIDE PURCHASERS; ELECTIONS, 3, 4; EXECUTORS AND ADMINISTRATORS, 10, 11; FRAUDULENT CONVEYANCES, 2, 6, 9, 10, 11; GUARANTY, 1; JUDICIAL SALES, 1; PARTNERSHIP, 18; NOTARIES, 6; NEGOTIABLE INSTRUMENTS, 9; STATUTE OF LIMITATIONS, 1.

NUISANCE.

See HIGHWAYS, 5; RAILROADS, 2.

NUNC PRO TUNC.

See JUDGMENTS, 1.

OATHS.

See AFFIDAVITS.

OFFICES AND OFFICERS.

1. STATUTE THAT ACTIONS AGAINST PUBLIC OFFICER FOR ACTS DONE by him in virtue of his office shall be tried in the county where the cause arose, applies only to affirmative acts of the officer, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 655.
2. MINISTERIAL OFFICERS ARE FREE FROM CONTROL OF CORPORATION in executing ordinances which are of a public nature and for public purposes. *Dargan v. Mayor etc. of Mobile*, 505.

See ATTACHMENTS, 6; CORPORATIONS; COUNTIES, 3; ELECTIONS; HIGHWAYS, 1-3; NOTARIES.

OLOGRAPHIC WILLS.

See WILLS, 4.

ORDERS.

See ASSIGNMENTS OF CONTRACT, 2; AUCTIONS; EXECUTORS AND ADMINISTRATORS, 7; GUARDIAN AND WARD, 6.

ORDINANCES.

See CORPORATIONS, 6; OFFICES AND OFFICERS, 2.

ORPHANS' COURTS.

See PROBATE COURTS.

OUSTER.

See CO-TENANCY, 4, 5.

OVERSEERS.

See HIGHWAYS, 1-3.

PARENT AND CHILD.

ADVANCEMENT TO SON, IN FULL OF ALL CLAIMS AGAINST ESTATE of the father, will not, after his death, prevent the son taking, as heir, a residuum not disposed of by will. *Needle's Ex'r v. Needles*, 85.

See TRUSTS AND TRUSTEES, 5.

PAROL CONTRACTS.

See CONTRACTS, 6, 7; LANDLORD AND TENANT, 5-8; RECORDS, 5; SPECIFIC PERFORMANCE, 4; STATUTE OF FRAUDS; VENDOR AND VENDEE, 2, 7.

PAROL EVIDENCE.

See BOUNDARIES; COMMON CARRIERS, 6, 14, 15; CONTRACTS, 6, 7; EXECUTORS AND ADMINISTRATORS, 2; FRAUDULENT CONVEYANCES, 7; HUSBAND AND WIFE, 9.

PARTIES.

See EQUITY, 4, 5; EXECUTORS AND ADMINISTRATORS, 4, 19, 20; INSANITY; JUDGMENTS, 8, 9; MORTGAGES, 19; PLEADING AND PRACTICE, 2, 6-8.

PARTITION.

See CO-TENANCY, 8, 9; MARRIAGE AND DIVORCE, 11; SPECIFIC PERFORMANCE, 1.

PARTNERSHIP.

1. BUSINESS RELATIONS CONSTITUTING PARTNERSHIP.—N. and L. agreed that L. should advance twelve thousand dollars to commence erecting a house on land held by N. under lease; that N. should then convey a half-interest in the property to L.; that both should finish the building at a cost of eighteen thousand dollars each, and should divide the rents received from it thereafter: *Held*, that N. and L. were copartners. *Laffan v. Naglee*, 678.
2. SALE BY PARTNER OF HIS INTEREST IN PERSONAL PROPERTY OF FIRM passes nothing but his interest in the surplus, after payment of the partnership debts. *Coover's Appeal*, 149.
3. PARTNERSHIP CREDITORS WHO HAVE NO LIEN ON PERSONAL PROPERTY OF FIRM have no means of enforcing their claim to a preference in the distribution of it; their equity is only to be worked out through the equities of the partners themselves, each of whom has a right, while he exercises dominion over the property, to insist on its application to partnership claims before it be appropriated to the individual debts of the several partners. This right may, however, be waived by each partner disposing of all his interest in the property. *Id.*
4. LIEN ACQUIRED BY PARTNERSHIP CREDITORS ON JOINT ASSETS CANNOT BE DEFEATED by any subsequent disposition of the property by the several partners. *Id.*
5. WHERE EXECUTIONS ARE ISSUED AGAINST INDIVIDUAL PARTNERS FOR SEPARATE DEBTS, AND ALSO AGAINST FIRM for partnership debts, and by agreement of the execution creditors the firm property is all sold at the same time, the firm creditors are entitled to preference, and are entitled to all the proceeds where necessary to satisfy their claims, and the rule is the same though the individual executions were prior in date. *Id.*
6. INDIVIDUAL CREDITORS OF PARTNER HAVE NOT SUCH EXCLUSIVE RIGHT TO PAYMENT out of his individual property as to render fraudulent an assignment of it for the benefit of the firm creditors. *Gadsden v. Carson*, 207.
7. INDIVIDUAL CREDITOR OF PARTNER MAY, IN EQUITY, COMPEL PARTNERSHIP CREDITOR to resort first to the partnership assets for payment, since the claim of the individual creditor applies only to the private property of his debtor, including whatever balance may remain to him out of the firm assets after its affairs are wound up, while the partnership creditor is entitled to payment not only out of the firm property, but also out of the private property of the individual partners. *Id.*
8. PARTNERSHIP CREDITOR, AFTER EXHAUSTING PARTNERSHIP FUNDS, IS ENTITLED EQUALLY WITH INDIVIDUAL CREDITORS to payment of an unsatisfied balance of his debt out of the private property of a partner. *Id.*
9. NOTES PAYABLE TO PARTNERSHIP TRANSFERRED BY PARTNER IN PAYMENT OF INDIVIDUAL DEBT cannot be reached by firm creditors on trustee process against the transferee; but if there was fraud in the transaction, a bill in equity is the proper remedy. *Huntton v. Dow*, 404.

10. TRANSFER BY PARTNER OF NOTES DUE PARTNERSHIP IN PAYMENT OF INDIVIDUAL DEBT, at a time when the insolvency of the partnership was not known, does not indicate fraud. *Id.*
11. FACT THAT MONEY WHICH WAS OBTAINED ON PERSONAL CREDIT OF MEMBER OF FIRM was used by the firm and for its exclusive benefit will not of itself make the firm liable to the creditor for such debt, but would be a good consideration to support a subsequent promise by the firm to pay the debt. *Siegel v. Chidsey*, 125.
12. CONFESSION OF JUDGMENT BY PARTNERS TO CREDITOR, on promise to pay the individual debt of a member of the firm for money borrowed by him and used by and for the exclusive benefit of the firm, is not the application of partnership effects to the private debt of a member of the firm, but the honest assumption by the partners of a debt created for their joint benefit, and which in equity and conscience they are equally bound to pay. *Id.*
13. ASSUMPTION BY FIRM OF DEBT OF MEMBER FOR MONEY BORROWED FOR EXCLUSIVE USE OF FIRM is not a fraudulent transaction as to the partners, because they all assent to it, and not as to the firm creditors, if they have no lien on the partnership effects, because their equities must be worked out through the partners themselves. *Id.*
14. INSOLVENCY DOES NOT OF ITSELF WORK DISSOLUTION OF PARTNERSHIP, nor divest partners of their authority over firm property. *Id.*
15. THE FACT THAT DRAFT DRAWN BY FIRM IS PAYABLE TO ORDER OF ONE PARTNER, and by him indorsed, is not evidence that it was not drawn by the firm in the usual course of business. *Haldeman & Grubb v. Bank of Middletown*, 142.
16. PRESUMPTION IS THAT DRAWING OF DRAFT OR BILL in name of firm by one partner, and offering the same for discount, is a partnership transaction, even though the draft or bill was made payable to the order of one of the members of the firm. *Id.*
17. PRESUMPTION THAT DRAWING OF DRAFT IN FIRM NAME and discounting it was a partnership transaction is not affected because the paper was discounted at the request of the partner who drew it in the name of the firm, and whose name was inserted as payee, and who indorsed it and drew the proceeds. *Id.*
18. ACTUAL KNOWLEDGE THAT NEGOTIABLE PAPER WAS GIVEN WITHOUT CONSENT of certain partners is a good defense to the non-consenting partners. *Id.*
19. NOTE OF FIRM GIVEN FOR PRIVATE DEBT OF ONE PARTNER IS GOOD against the firm in the hands of a *bona fide* holder; the right of the individual partner's creditor depending, however, on the consent of all the partners. *Id.*
20. IN ACTION AGAINST FIRM ON NEGOTIABLE PAPER DRAWN AND DISCOUNTED BY PARTNER IN NAME OF FIRM it is not error to reject evidence showing that the partner having the paper discounted appropriated the proceeds to his own use. *Id.*
21. IN ACTION AGAINST PARTNERSHIP, EVIDENCE HAVING NO TENDENCY TO DISPROVE EXISTENCE OF PARTNERSHIP, as that the partners held the real estate used in their partnership transactions as tenants in common, or that the counsel of one of the partners advised him not to enter into the partnership, or that the partner having the paper discounted did not

pay over to the other partner his proportion of the profits of the concern, is not admissible for that purpose. *Id.*

22. PARTNER IN LEASEHOLD PURCHASING FEE in his own name, with his own money, the lessees being entitled to a refusal of the property, purchases for both, and the other partner becomes entitled to his share upon payment of his proportion of the purchase money. *Laffan v. Naglee*, 678.
23. SOLE MANAGING PARTNER'S RELATION TO COPARTNER IS ONE OF GREAT CONFIDENCE, and requires the utmost good faith; and proof must be clear to show that the copartner has waived any of his rights to property legally inuring to the partnership. *Id.*
24. DEDICATION OF PARTNERSHIP PROPERTY BY MANAGING PARTNER TO STREET PURPOSES, to render the remaining portion more valuable, inures to the benefit or detriment of all the partners in proportion to their shares. *Id.*
25. PARTNER ADVANCING FUNDS will not be allowed compound interest. *Id.*
26. PARTNER RECEIVING MONTHLY RENTS IS CHARGEABLE WITH INTEREST from date of receipt until paid over to the partnership. *Id.*
27. CONTRACT MADE BY REPRESENTATIVES OF DECEASED PARTNER, without authority, and touching matters over which the surviving partner had entire control, will be considered as wholly inoperative to affect the rights and estate of the firm when it is declared inoperative as to the surviving partner. *Lockwood v. Mitchell*, 78.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 2; COMMON CARRIERS, 1.

PASSENGER CARRIERS

See COMMON CARRIERS.

PAUPERS.

See POOR-LAWS.

PAYMENT.

1. ACCEPTANCE OF AMOUNT OFFERED OPERATES AS SATISFACTION OF DEBT when the sum in controversy is unliquidated, and the party offering attaches to his offer the condition that the sum, if taken at all, must be received in full satisfaction of the debt, even though the party receiving the money in so doing declares that he will receive it only in part payment; and this is the rule in equity as well as at law, unless there exists some special equitable ground of relief therefrom. *McDaniels v. Bank of Rutland*, 406.
 2. OBJECT OF PROTEST is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It has no application to voluntary payments. *McMillan v. Richards*, 655.
 3. PROTEST DOES NOT PREVENT PAYMENT BEING DISCHARGE of the demand upon which it is made, so far as such demand is legal. *Id.*
 4. LAW RAISES OBLIGATION TO REFUND MONEY PAID UPON COMPULSION, and the form of action is *assumpsit* for money had and received. *Id.*
- See ALTERATION OF INSTRUMENTS; DEEDS, 6; EXECUTIONS, 37; MORTGAGES, 4; STATUTE OF FRAUDS, 3, 4; TRUSTS AND TRUSTEES, 3, 4; VENDOR AND VENDEE, 7.

PEACE-OFFICERS.**See CORPORATIONS, 6.****PENALTIES.****See DAMAGES, 1; EXECUTIONS, 25; GAS COMPANIES, 6; HIGHWAYS, 5; SEAS-
UTE OF FRAUDS, 1.****PERFORMANCE.****See CONFLICT OF LAWS, 3; EXECUTIONS, 27; SPECIFIC PERFORMANCE.****PERSONAL REPRESENTATIVES.****See EXECUTORS AND ADMINISTRATORS.****PEWS.****RIGHT TO PEW CAN BE TRANSFERRED ONLY IN MANNER PROVIDED FOR
TRANSFER OF REALTY. *Barnard v. Whipple*, 422.****See EXECUTIONS, 13.****PLEADING AND PRACTICE.**

- 1. RULE THAT PLEADING IS TAKEN MOST STRONGLY** against the party making it is drawn from the legal supposition that every suitor will state his case as strongly as the facts warrant. *Green v. Covillaud*, 725.
- 2. AT TIME SUIT IS INSTITUTED TO ENFORCE MORTGAGE OR MECHANICS' LIEN** all persons interested in the estate should be made parties or their rights will not be affected. *Whitney v. Higgins*, 748.
- 3. NO GREAT STRICTNESS SHOULD BE REQUIRED** as to the manner of stating facts in the records of courts of limited and special jurisdiction. *Per BURNETT, J. Haynes v. Meeks*, 703.
- 4. CONTRACT RELATING TO REAL PROPERTY** need not be alleged to be in writing. That is a matter of proof upon the trial. *Dawson v. Miller*, 380.
- 5. AMENDMENT TO BILL DOES NOT MAKE NEW CASE, AND IS PROPERLY ALLOWED** in a case where the bill is filed by a husband as sole legatee of his wife to recover her distributive share in her father's estate, and the amended bill exhibited a marriage contract which secured to him a life estate in his wife's personalty, and to her a separate estate in the remainder; for both titles set out give him the entire interest in the subject-matter. *Blackwell v. Blackwell*, 556.
- 6. AMENDMENT TO PETITION SUBSTITUTING PRINCIPALS AS PLAINTIFFS, in an action brought by their agent, affords the defendant no ground of objection, unless he was thereby deprived of some substantial right. *Price v. Wiley*, 323.**
- 7. SUBSTITUTION OF PRINCIPALS IN ACTION BY AGENT IS NOT MAKING NEW PARTY, where it is done with the consent of the agent, and upon his allegation that he has no interest in the note sued on, but is merely the agent of the new plaintiffs. *Id.***
- 8. PRINCIPALS CANNOT BE SUBSTITUTED AS PLAINTIFFS IN ACTION BY AGENT AFTER AGENT'S DEATH, where the fact that he sues for their use does not appear from the petition, but the suit must be revived in the name of his representatives, and the principals claiming to be the real parties in**

20. SUPREME COURT WILL NOT REVERSE RULING OF COURT EXCLUDING LETTER offered in evidence at the trial, when the bill of exceptions does not disclose what were its contents. *Sewell v. Eaton*, 471.
21. ALLOWING PARTY TO EXCEPT TO PLEADINGS ORALLY, the exceptions to be afterwards reduced to writing, where the trial proceeds without such written exceptions, and they are filed long after adjournment, is no ground of reversal; as in case of a demurrer to an answer submitted orally and not filed until many months after the adjournment. *Cooper v. Singleton*, 333.
22. WHERE SUIT WAS ORIGINALLY BROUGHT BEFORE JUSTICE OF PEACE, and on appeal the parties went to trial without objection, on a declaration for "money had and received," all objections to the form of action or jurisdiction of the justice are considered as having been waived. *Woodring v. Fort's Township*, 134.
23. OMISSION IN STATEMENT OF FACTS ON APPEAL OF IMPORTANT DOCUMENT, leaving it uncertain what the evidence was below, will not preclude a revision of the judgment, where the opinion of the appellate court proceeds on grounds which render the missing evidence immaterial. *Wheeler v. Hollis*, 363.
24. QUESTION OF VARIANCE BETWEEN NOTE DECLARED ON AND THAT OFFERED IN EVIDENCE may be raised in the appellate court, under an exception to a general charge in favor of the plaintiff's right to recover. *Milton v. Haden*, 523.
25. ALLEGATA AND PROBATA MUST AGREE, and averments material to the case omitted from the pleading cannot be supplied by evidence. This is a cardinal rule in equity as well as in all other pleading, and is peculiarly necessary upon a bill for specific performance. *Green v. Covilland*, 725.
26. CALLING MINDS OF JURY TO PARTICULAR PARTS OF EVIDENCE is objectionable as giving such parts undue prominence, but where it is done at the request of one party, and the same favor is afterwards, by request, extended to the other party, it will not be considered sufficient error to warrant a reversal of the judgment. *Wood v. Chambers*, 382.
27. GENERAL CHARGE ON EVIDENCE IN FAVOR OF PARTY is invasion of province of jury, where an inference of fact is necessary to be drawn before such party is entitled to recover. *White v. Hass*, 543.
28. INSTRUCTIONS ARE NOT ERRONEOUS merely because they do not embrace every aspect in which the law applicable to the case might have been presented to the jury. *Linn v. Wright*, 282.
29. MERE OMISSION TO GIVE INSTRUCTIONS NOT ASKED, but which would have been proper, is not error. *Id.*
30. REFUSAL OF CHARGE IS NOT ERRONEOUS when it is abstract and is not in every particular authorized by the law and justified by the evidence in the particular case. *Crommelin v. Thiess*, 499.
31. EFFECT OF ERRONEOUS INSTRUCTIONS MAY BE REMOVED by other portions of the charge, and if upon the whole the charge is not unfavorable to the appealing party, judgment will not be reversed. *Wood v. Chambers*, 382.
32. EXCEPTION TO INSTRUCTION MUST BE TAKEN BEFORE JURY LEAVE BAR. *City Council v. Gilmer*, 562.
33. DECISION OF SUPREME COURT UPON FORMER APPEAL IS LAW OF CASE, and not open to revision on second appeal; therefore, if that decision asserts

2. CONVEYANCE OF LAND BY PARTY OUT OF POSSESSION, and with an adverse possession against him, is void at common law. *Edgerton v. Bird*, 471.
See ADVERSE POSSESSION; AGENCY, 9; CO-TENANCY, 3, 7; CRIMINAL LAW, 11, 12; DETINUE; EJECTMENT; FORCEFUL ENTRY AND UNLAWFUL DETAINER, 1; FRAUDULENT CONVEYANCES, 4; INFANT, 2; NEGOTIABLE INSTRUMENTS, 2; STATUTE OF FRAUDS, 4; TRESPASS, 1, 2; TROVER, 2; TRUSTS AND TRUSTEES, 2; VENDOR AND VENDEE, 2.

POST-OBIT CONTRACTS.

See CONTRACTS, 2.

POWER OF ATTORNEY.

See VENDOR AND VENDEE, 6.

PRACTICE.

See PLEADING AND PRACTICE.

PREFERENCES.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY AND INSOLVENCY; PARTNERSHIP, 3, 5.

PRESCRIPTION.

See ADVERSE POSSESSION; FERRIES, 2.

PRESENTMENT.

See CONSTITUTIONAL LAW; ESTATES OF DECEDENTS, 3-5; MORTGAGES, 12; NEGOTIABLE INSTRUMENTS, 2, 4.

PRESUMPTIONS.

See ADVERSE POSSESSION, 2, 4; ALTERATIONS OF INSTRUMENTS; ATTACHMENTS, 6; CRIMINAL LAW, 1; EJECTMENTS, 20; EJECTORS AND ADMINISTRATORS, 23, 24; FERRIES, 2; HUSBAND AND WIFE, 3-5; JUDGMENTS, 12; LANDLORD AND TENANT, 5, 6; MAILS; MARRIAGE AND DIVORCE, 5; NEGOTIABLE INSTRUMENTS, 9; PARTNERSHIP, 16; RAILROADS, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVIES.

See JUDGMENTS, 2.

PROBATE COURTS.

1. PROBATE JUDGE IS NOT VESTED WITH PLenary POWERS, but acts within an inferior and limited jurisdiction. *Per MURRAY, C. J. Haynes v. Meeks*, 703.
2. FACTS OF DEATH OF INTERSTATE AND OF HIS RESIDENCE WITHIN COUNTY must exist before the probate court can make a binding order in refer-

once to the subject-matter or the person; but when proved to exist, every subsequent movement of such court is the exercise of jurisdiction over both the subject-matter and all persons who have been brought properly before it. *Per* BURNETT, J. *Id.*

2. **IN PROBATE SALES, CAVEAT EMPTOR IS RULE**, and it is no excuse for not paying the bid that the bidder finds the title defective. *Halleck v. Guy*, 643.
4. **RULE OF CAVEAT EMPTOR APPLIES TO SALES OF LAND UNDER ORDER OF PROBATE COURT.** *Burns v. Hamilton's Adm'r*, 570.
5. **PURCHASER OF LAND AT PROBATE SALE, WHO OBTAINS NO TITLE THEREBY**, will not be relieved in equity from his purchase on the ground of ignorance of the legal effect of known facts affecting the title. *Id.*
6. **EQUITY WILL NOT RELIEVE PURCHASER OF LAND AT PROBATE SALE** which transfers no title, when there is no mistake or ignorance of any material fact, no fraud nor warranty. *Id.*
7. **SALE OF DECEDENT'S LAND UNDER ORDER OF PROBATE COURT TRANSFERS NO TITLE**, when the decedent, at the time of his death, had a mere pre-emption claim to the land, although the land is afterwards entered in the name of his heirs. *Id.*
8. **ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS; STATUTES.**

PROCEDURE.

See CONFLICT OF LAWS, 4.

PROCESS.

See DETINUE, 1.

PROCLAMATIONS.

See ELECTIONS, 2-4.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See PAYMENT, 2, 2.

PUBLIC LANDS.

REMOVAL OF GRANTEE FROM TEXAS to one of the states of the Mexican confederacy is not an abandonment of the former, within the inhibition of the thirtieth article of the colonization law of March 24, 1825. *Grace-meyer v. Deeson*, 309.

See PROBATE COURTS, 7.

QUESTIONS OF LAW AND FACT.

See ELECTIONS, 31; EXECUTORS AND ADMINISTRATORS, 1; FRAUD, 2; NEGLIGENCE; SALES, 5.

QUITCLAIM DEEDS.

See TENDER, 2.

bond required of the claimant. This estimate may be acquiesced in by the parties to the suit, and taken as the true value for the purpose of rendition and enforcement of judgment, but it has never been held that the estimate of value thus made was conclusive upon the parties. *Linn v. Wright*, 282.

2. WHERE IN ACTION OF REPLEVIN the issue made is the question in general terms of the claimant's right of property in the goods, and the only pleading before the court at that time is the claimant's answer, in which he does not plead his title or inform the opposing party or court on what title he intends to rely to maintain his claim to the property, but afterwards relies on a trust deed for that purpose, the opposing party must be allowed to impeach the validity of such deed. *Id.*

RES GESTÆ.

See COMMON CARRIERS, 16.

RESIDENCE.

See DOMICILE; HOMESTEADS.

RESTITUTION.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER; MANDAMUS, 1.

RESULTING TRUSTS.

See HUSBAND AND WIFE, 6.

RETURNS.

See ATTACHMENTS, 2, 4-6; ELECTIONS, 5; EXHIBITIONS, 20, 22; HABEAS CORPUS, 6.

REVERSAL.

See NEW TRIAL, 2; PLEADING AND PRACTICE, 20, 21.

REVERSIONS.

See HUSBAND AND WIFE, 10.

RIVERS.

See WATERCOURSES.

ROADS.

See HIGHWAYS; RAILROADS.

ROBBERY.

See CRIMINAL LAW, 17-19.

SALES.

1. ONE MAY TRANSFER TITLE TO CROPS NOT THEN IN HARVEST, and which are to be grown upon the land; and the property will pass as soon as they are grown. *Baxter v. Bush*, 429.
2. SALE OF PERSONAL PROPERTY IS COMPLETE, AND PASSES TITLE TO BUYER, although the thing sold has not been measured or the quantity ascer-

tained in any way, when it is apparent that it is the intention of the seller to transfer the title, and of the buyer to accept it. *Sewell v. Eaton*, 471.

3. WHERE ONE HAS LARGE NUMBER OF BARRELS OF FLOUR IN WAREHOUSE, AND SELLS ENTIRE QUANTITY TO SEVERAL SEPARATE PURCHASERS, giving to each his delivery order upon his warehouseman, if the purchasers all surrender their several orders to the warehouseman without making any separation, but voluntarily leave the flour standing on the books to the credit of each for his proper number of barrels, the delivery to each purchaser is complete. When each purchaser presented his order, he was entitled to a separation of his number of barrels from the mass, or not, at his election. *Horr v. Barker*, 791.

4. TITLE TO PERSONAL PROPERTY CANNOT BE ACQUIRED FROM ONE WHO HAS HIMSELF NO TITLE, in general, except by a *bona fide* sale in market overt, and no market overt exists in South Carolina. *Carmichael v. Buck*, 226.

5. IT IS COMPETENT, IN ACTION AGAINST VENDOR FOR FAILURE TO DELIVER FLOUR BY CERTAIN AGREED DATE, for him to show that the vendee had said, after the written agreement had been made, that if the tide did not rise in the river over which the flour was to be transported, it need not be delivered by that time. The effect of this evidence is a question of fact for the jury. *Bryan v. Hunt*, 262.

See AGENCY, 2; AUCTIONS; BONA FIDE PURCHASERS; COVENANTS; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 10-16; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD, 6, 7; JUDICIAL SALES; PARTNERSHIP, 2; PROBATE COURTS; TAXATION.

SATISFACTION.

See JUDGMENTS, 19, 20; PAYMENTS.

SCIRE FACIAS.

See JUDGMENTS, 11, 21.

SCIENTIFIC BOOKS.

See EVIDENCE, 2.

SECONDARY EVIDENCE.

See EVIDENCE, 4.

SENTENCE.

See HABEAS CORPUS, 2, 5, 7.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 9; MARRIED WOMEN, 1-3, 5.

SET-OFF.

DEBT NOT DUE CANNOT AT ITS FACE BE OFFSET AGAINST ANOTHER AT THE FACE where they bear different rates of interest. *Halleck v. Gwy*, 643.

SETTLEMENTS.

See EXECUTORS AND ADMINISTRATORS, 5, 9, 23-36; HOMESTEAD; INSANITY, 2; POOR-LAWS, 2, 3.

SEWERS.

See CORPORATIONS, 14, 15, 17, 21, 22.

SHERIFFS.

See ATTACHMENTS, 6; EXECUTIONS, 17, 18, 33; FORCEIBLE ENTRY AND UNLAWFUL DETAINER; INTERPLEADER, 2; MANDAMUS, 1, 4; MARRIED WOMEN, 4, 6.

SHERIFFS' DEEDS.

See DEEDS, 8; ESTOPPEL, 9; EXECUTIONS.

SHERIFFS' SALES.

See EXECUTIONS; LANDLORD AND TENANT, 12, 14; MARRIED WOMEN, 4, 6; STATUTE OF FRAUDS, 1, 2.

SHIPPING.

See COMMON CARRIERS.

SIGNATURES.

See CONTRACTS, 2; EXECUTORS AND ADMINISTRATORS, 12; WILLS, 4; WITNESSES, 3, 4.

SLAVES.

See CORPORATIONS, 6.

SOLE TRADERS.

See MARRIED WOMEN, 5.

SPECIFIC PERFORMANCE.

1. TEXAS COURT OF EQUITY HAS POWER AND JURISDICTION TO DECREE SPECIFIC PERFORMANCE and partition, and such decree vests the title to the land conveyed in the party named therein. The statute has deprived the court of none of its powers in this particular. *Grassmeyer v. Beeson*, 309.
2. COUNTY COURT'S JURISDICTION TO ENFORCE SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACT TO CONVEY LAND in a suit against his administrator, under the Texas statute, is special, and exists only where there is a bond or a contract in writing, disclosing all the terms of the agreement, in analogy to the memorandum required by the statute of frauds. *Peters v. Phillips*, 319.
3. DECEDENT'S BOND TO CONVEY RECITING CONTRACT FOR CONVEYANCE in all its terms is sufficient to confer jurisdiction upon the county court, under the statute, for the specific enforcement of the contract, although the contract is not produced. *Id.*
4. TERMS OF PAROL CONTRACT FOR SALE OF LAND MUST BE INDUBITABLY ESTABLISHED, and must be free from all doubt or ambiguity, in order to justify a court of equity in enforcing its specific performance. *Blanchard v. McDougal*, 458.
5. PARTY TO CONCURRENT OBLIGATION SEEKING ENFORCEMENT of the stipulations of the other must first show a compliance with his own. *Green v. Covilland*, 725.

6. COURT OF EQUITY WILL NOT ENFORCE SPECIFIC PERFORMANCE of a contract to convey lands, when the plaintiff shows no compliance or offer to comply on his part with the agreement, nor any excuse therefor, for the period of twenty-one or twenty-two months from the time he bound himself to perform. *Id.*
7. TIME IS NOT ORDINARILY OF ESSENCE OF CONTRACT TO CONVEY land, yet in every case it devolves upon the party seeking specific performance to account for his delay, and if there are circumstances showing culpable negligence on his part, or if the time permitted to intervene, together with other circumstances, raise the presumption of an abandonment of the contract, or if the property has greatly enhanced in value, and the purchaser has laid by apparently for the purpose of taking advantage of this circumstance, he is not entitled to specific performance of his contract. *Id.*
8. WHERE PARTY TO CONTRACT, WHOSE SPECIFIC PERFORMANCE IS SOUGHT, RESISTS the performance, and insists that he is not bound by the contract, no tender of the purchase money need be made before bringing suit. *Wright v. Young*, 447.
9. IF WIFE OF VENDOR REFUSES TO RELEASE HER DOWER IN LAND contracted to be sold by him, and the vendee is willing to take such title as the husband has to give, he may enforce the performance of the contract, and have an abatement of the purchase money in compensation for the right of dower left outstanding. *Id.*
10. INCHOATE RIGHT OF DOWER OUTSTANDING IS DEFECT IN TITLE, and an incumbrance upon the estate, but its value is susceptible of accurate calculation. *Id.*

See PLEADING AND PRACTICE, 25; STATUTES.

STAKE-HOLDERS.

See GAMING, 2, 3.

STARE DECISIS.

See PLEADING AND PRACTICE, 33.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS HAS NO APPLICATION TO ENFORCEMENT OF PENALTY for not completing the contract of sale of land agreed upon, by making a bid at an execution sale. *Lockridge v. Baldwin*, 385.
2. SALES BY AUCTIONEERS, SHERIFFS, OR ADMINISTRATORS ARE WITHIN STATUTE OF FRAUDS, and the auctioneer may be regarded as the agent of both vendor and purchaser, with authority to sign for them equally in sales of real or personal property. *Dawson v. Miller*, 380.
3. MERE PAYMENT OF PORTION OF PURCHASE MONEY, unaccompanied by any other act, is not sufficient to take a parol agreement for the sale of land out of the statute of frauds. *Blanchard v. McDougal*, 458.
4. DELIVERY OF POSSESSION BY VENDOR TO VENDEE AND CONTINUATION THEREOF by the latter, together with the payment of a considerable part of the purchase money, will take a parol agreement for the sale of land out of the statute of frauds, provided the possession be taken and continued under the contract. *Id.*

See HUSBAND AND WIFE, 9; LANDLORD AND TENANT, 6, 7; PLEADING AND PRACTICE, 4; SPECIFIC PERFORMANCE, 4.

STATUTE OF LIMITATIONS.

1. **STATUTE OF LIMITATIONS DOES NOT RUN AGAINST ACTION FOR DIVIDENDS** of stockholder in corporation until after demand and refusal, or notice that the stockholder's right to dividends is denied. *Philadelphia etc. R. R. Co. v. Council*, 123.
 2. **STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN IN FAVOR OF GUARANTOR UPON CONTINUING GUARANTY** until there is a default in payment by the principal, and a full and complete cause of action has accrued against the guarantor. *Bank v. Knott*, 234.
- See **ADVERSE POSSESSION**; **EXECUTIONS**, 21; **EXECUTORS AND ADMINISTRATORS**, 22-24; **TAXATION**, 1; **TRUSTS AND TRUSTEES**, 12.

STATUTES.

- NEW REMEDY GIVEN BY STATUTE** for failure of a bidder to comply with the terms of a probate sale is cumulative, and does not take away the common-law remedy, or remedy by suit, to compel specific performance. *Dawson v. Miller*, 330.
- See **CONSTITUTIONAL LAW**; **CRIMINAL LAW**, 2, 14; **ELECTIONS**; **ESTATES-TAIL**, 6; **EXECUTORS AND ADMINISTRATORS**, 17; **STATUTE OF FRAUDS**; **STATUTE OF LIMITATIONS**; **WILLS**, 3.

STREAMBOATS.

See **COMMON CARRIERS**, 1, 2, 15, 16.

STOCK AND STOCKHOLDERS.

See **AGENCY**, 6; **CORPORATIONS**, 1, 2; **STATUTE OF LIMITATIONS**, 1.

STREAMS.

See **WATERCOURSES**.

STREETS.

See **CORPORATIONS**, 15, 16, 18, 19-22; **HIGHWAYS**.

STRUCK JURY.

See **JURY AND JURORS**.

SUBLEASE.

See **LANDLORD AND TENANT**, 10.

SUBROGATION.

See **ISSUANCE OF DEEDS**, 4; **MORTGAGES**, 14-16; **VENDOR AND VENUE**, 1; **TRUSTS AND TRUSTEES**, 9.

SUBSCRIPTION.

1. **SUBSCRIPTION FOR PURPOSE OF ERECTING CHURCH BUILDING MAY BE ASSIGNED** by the vestry in payment therefor; and the contractor who undertakes to build the church, and to whom the subscription has been assigned, may sustain an action therefor in his own name. *Hopkins v. Updegr*, 375.

TENANCY IN COMMON.

See CO-TENANCY.

TENDER.

1. OFFER OF CERTAIN SUM IN SATISFACTION OF UNLIQUIDATED CLAIM does not operate as a legal tender if refused. *McDonald v. Bank of Rutland*, 406.
2. WHERE MONEY PAID INTO COURT BY WAY OF TENDER IS WITHDRAWN under an order of the court, such withdrawal cannot affect the validity of the tender. *Wright v. Young*, 447.
3. TENDER OF QUITCLAIM DEED, WITHOUT RELEASE OF DOWER OF WIFE of the grantor, is not a sufficient compliance with a contract by which the bargainor agrees to convey the entire estate in the land by a good and sufficient conveyance. *Id.*

See SPECIFIC PERFORMANCE, 8.

TIMBER.

See HIGHWAYS, 1-3.

TIME.

See CONTRACTS, 8; SPECIFIC PERFORMANCE, 7.

TITLE.

See ADVERSE POSSESSION, CO-TENANCY, 1, 2; DEEDS, 7; DEFINITIONS; DETINER, 2, 3; EJECTMENT; EXECUTIONS, 2, 13, 28, 31; HUSBAND AND WIFE, 1; MARRIED WOMEN, 6; NEGOTIABLE INSTRUMENTS, 2; NOTICE; POSSESSION, 1; PROBATE COURTS; SALES, 2, 4; SPECIFIC PERFORMANCE, 1, 9, 10; TRESPASS, 1; TROVER, 2; VENDOR AND VENDER; WATERCOURSE, 4.

TITLE DEEDS.

See VENDOR AND VENDER, 4, 5.

TOLL.

See FERRIES.

TON.

See WEIGHTS AND MEASURES.

TOOLS.

See EXECUTIONS, 7-9.

TORTS.

See INFANCY, 1.

TOWN CLERKS.

See CORPORATIONS, 7-12.

TRESPASS.

- 1 RULE THAT MERE TRESPASSER CANNOT SHOW TITLE IN THIRD PARTY is generally true, but not universally so. It is true when plaintiff relies on prior possession for his title. *Bird v. Lisbroe*, 617.

2. **TRESPASS DE BONIS ASPORTATIS** MAY BE SUSTAINED BY PROOF OF ANY UNLAWFUL INTERFERENCE with or exercise of acts of ownership over property, to the exclusion of the owner. It is not necessary to prove actual forcible dispossession of the property, in order to maintain the action. *Dexter v. Cole*, 465.

3. **WRONGFUL INTENT** IS NOT NECESSARY TO CONSTITUTE TRESPASS; it is sufficient if the act is done without a justifiable cause or purpose, though it be done accidentally or by mistake. *Id.*

See **ANIMALS**, 3; **CO-TENANCY**, 9; **HIGHWAYS**, 1.

TROVER.

1. **LESSOR MAY RECOVER IN TROVER** VALUE OF CROPS CONVERTED BY LESSEE who has not paid the rent, under provision in lease that the lessor shall have a full lien on the crops of that year as security for the payment of the rent, since this provision gives the lessor the ownership of the crops until the rent is paid. *Baxter v. Bush*, 429.

2. **TO SUSTAIN TROVER**, PLAINTIFF MUST SHOW TITLE TO PROPERTY CONVERTED, either general or special, and a right to the immediate possession. *Id.*

See **INFANCY**, 1; **LANDLORD AND TENANT**, 2.

TRUST DEEDS.

See **TRUSTS AND TRUSTEES**, 7, 8.

TRUSTEE PROCESS.

See **PARTNERSHIP**, 9.

TRUSTS AND TRUSTEES.

1. **WANT OF CONSIDERATION FOR DEED** IS EVIDENCE OF TRUST RELATION between the parties. *Vandever v. Freeman*, 391.

2. **POSSESSION OF LAND BY GRANTORS AFTER CONVEYANCE** is a strong corroborative circumstance to establish a trust relation between grantor and grantee. *Id.*

3. **PAYMENT OF PURCHASE MONEY AS EVIDENCE OF TRUST** is an affirmative fact, and must be established by higher testimony than proof of declarations of the deceased alleged trustee. *Id.*

4. **NON-PAYMENT OF PURCHASE MONEY AS EVIDENCE OF TRUST** is a negative fact, and the admissions of the deceased alleged trustee become appropriate evidence, and when sustained by corroborating circumstances, comply with the rules of evidence. *Id.*

5. **TRUST IS NOT CREATED IN FAVOR OF SON OF VENDEE OF LAND** by a mere declaration of the vendee, at the time of making the purchase, that "he was going to buy the land for his son," if there is no further proof of any agreement to do so, nor any evidence that the son furnished the money to pay for it. *Lloyd v. Lynch*, 137.

6. **SUIT TO CANCEL DEED ALLEGED TO BE IN TRUST** need not be brought in the county in which the land is situated. *Vandever v. Freeman*, 391.

7. **UNLESS THERE IS SOME REFERENCE OR DESCRIPTION** to the property conveyed, either in the body of the trust deed or a schedule annexed to it, so as to render the property capable of being ascertained and identified,

the deed will not ordinarily transfer title, but will be inoperative and void. This omission is, in some cases, a badge of fraud, which may, however, be repelled. *Linn v. Wright*, 282.

8. ABSENCE OF SCHEDULE CONTAINING DESCRIPTION OF PROPERTY, and prepared previous to the making of the deed of trust, is a suspicious circumstance, which, unless explained, or unless there is proof of what particular property was embraced in the assignment, is a sufficient ground to exclude the assignment from the consideration of the jury. *Id.*
 9. CESTUI QUE TRUST MAY BE SUBROGATED TO RIGHTS OF ADMINISTRATOR, where land held in trust by a deceased trustee has been sold on credit by the administrator. The notes taken in payment will be canceled, and the money will be ordered to be paid by the innocent purchasers to the cestui que trust. *Vandever v. Freeman*, 391.
 10. TRUSTEES OPERATING RAILROAD FOR BENEFIT OF BONDHOLDERS ARE PERSONALLY LIABLE to owners of freight and to passengers, to the same extent as the company would be if operating the road, and in the same way lessees or mere intruders who operate the road are liable. *Sprague v. Smith*, 424.
 11. PURCHASE BY TRUSTEE OF OUTSTANDING CLAIMS OR TITLES inures to the benefit of the cestui que trust, on his election being expressed within a reasonable time. *Wiscall v. Stewart*, 549.
 12. CESTUI QUE TRUST, ELECTING NOT TO CONSIDER TRUSTEES' PURCHASE OF OUTSTANDING DISPUTED CLAIMS as being made on his account, and engaging in a protracted litigation with them for the establishment of their legal title under the purchase, cannot, after the lapse of six years from the purchase, and after a court of law has decided in favor of the trustees, come into a court of equity and have the purchase held for his benefit. *Id.*
- See BONA FIDE PURCHASERS; CORPORATIONS, 1; ESTATES OF DECEDENTS, 4, 5; FRAUDULENT CONVEYANCES, 4; HUSBAND AND WIFE, 9; REFLEXIVE, 2.

UNINCORPORATED SOCIETIES.

See COVENANTS.

UNLAWFUL DETAINER.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

UNLAWFUL

- "UNIVERSAL PRACTICE AND UNDERSTANDING OF PERSONS EMPLOYED IN NAVIGATING" PARTICULAR RIVER will not, of itself, constitute a custom. *McClure v. Cox*, 552.

See COMMON CARRIERS, 6, 14, 15.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 9.

USURY.

1. ALLEGATIONS AND PROOF THAT WRITTEN CONTRACT IS NOT USURIOUS, where it appears to be so, must be explicit, and clear of all doubt. *Lockwood v. Mitchell*, 78.

8. **DEFECT OF TITLE TO LAND IS GOOD DEFENSE TO VENDER** in an action for the purchase money, so long as the contract is executory; and the vendor must show that the vendee purchased at his own risk, and with knowledge of the defect, or that he agreed to take such title as the vendor had. *Cooper v. Singleton*, 333.
9. **VENDEE IN EXECUTED CONTRACT FOR REALTY CANNOT RESIST PAYMENT** of the purchase money for defect or failure of title, as a general rule, both in England and in the United States; but unless there have been fraudulent representations, must pay the money, and rely upon the covenants in his deed; but the rule is otherwise in Texas, and the vendee, after conveyance, may resist payment for a total failure of title, though there be no fraud, and is not compelled to resort to his covenants, especially where the vendor is or may be insolvent or beyond the reach of the court, unless the vendee takes a conveyance with warranty, with knowledge of the defects, when he cannot resist payment unless he has been evicted. *Id.*
10. **DISTINCTION BETWEEN LIABILITIES OF VENDER IN EXECUTORY AND VENDER IN EXECUTED CONTRACT** for the sale of realty is that the former should be relieved from payment on showing defect of title, unless the vendor shows that he knew the defect at the sale, and consented to take such title as the vendor had; while the vendee in an executed contract, to escape payment, should show, beyond doubt, failure of title in whole or in part, danger of eviction, and circumstances *prima facie* repelling the presumption that he knew, and took the risk of the defect at the time of the sale. *Id.*
11. **PLEA OF VENDEE IN EXECUTED CONTRACT MUST AVER WANT OF KNOWLEDGE OF DEFECT IN TITLE** to the land purchased, where he seeks to defeat a recovery of the purchase money on the ground of such defect. *Id.*
12. **DEFENSE OF DEFECT OR FAILURE OF TITLE IS OF EQUITABLE NATURE** in an action to recover the price of land sold, and a plea setting up such defense should aver facts which would warrant relief in equity. *Id.*
13. **PLEA BY HUSBAND'S VENDEE THAT TITLE IS DEFECTIVE BECAUSE PROPERTY WAS COMMUNITY PROPERTY**, and that the vendor's wife is dead leaving several children, should show the condition of the community estate, so as to negative any idea that the heirs may be satisfied out of other property, in an action for the purchase money. *Id.*
14. **MEASURE OF DAMAGES FOR FAILURE OR DEFECT OF TITLE** to part of land conveyed is the relative value which the part taken away bears to the whole, as fixed by the price agreed upon for the whole, subject, however, to proof by the parties that the part lost was of greater or less value from particular advantages or disadvantages. But the expense of improvements cannot be considered in estimating such damage. *Beaupland v. McKeen*, 115.
15. **DEFENSE OF FAILURE OF TITLE TO PAYMENT OF PURCHASE PRICE OF LAND** is extinguished if the party attempting to set up an adverse title is, by his acts toward the vendee at such sale, estopped from setting up such title. *Id.*
16. **DEED OBTAINED BY FRAUDULENT REPRESENTATIONS OF GRANTOR IS NOT ABSOLUTELY VOID**, but voidable only at the election of the grantor; but the subsequent conveyance by him of the same land to another person is not the exercise of such election, and does not have the effect of avoiding the former deed. *Crocker v. Bellangee*, 489.

17. **TO AVOID DEED ON GROUND OF FRAUD PRACTICED BY GRANTOR** upon the grantor, the latter must institute some proceeding to which the former shall be a party, and a subsequent purchaser from the grantor cannot set up the alleged fraud to defeat the first grantee's title. *Id.*
18. **RIGHT OF GRANTOR TO AVOID DEED ON GROUND OF FRAUD** practiced upon him by the grantee cannot be transferred to another so as to enable the transferee, on that ground, to attack the grantee's title. *Id.*

VENUE.

See **JUDGMENT**, 18; **MANDAMUS**, 4; **OFFICES AND OFFICERS**, 1; **PLEADING AND PRACTICE**, 18; **TRUSTS AND TRUSTEES**, 6.

VERDICT.

See **DETINUE**, 4, 5; **FORCEIBLE ENTRY AND UNLAWFUL DETAINER**, 1; **NEW TRIAL**, 2.

VOID CONTRACTS.

See **CONFLICT OF LAWS**, 7; **CONTRACTS**, 3, 4, 9; **DEEDS**, 4; **LANDLORD AND TENANT**, 6-8; **VENDOR AND VENDEE**, 16-18.

WAGERS.

See **GAMING**.

WAIVER.

See **EXECUTIONS**, 15; **LANDLORD AND TENANT**, 4; **MARRIAGE AND DIVORCE**, 9; **PARTNERSHIP**, 3, 23; **PLEADING AND PRACTICE**, 22.

WARDS.

See **GUARDIAN AND WARD**.

WAREHOUSEMEN.

See **SALES**, 3.

WARRANTS.

See **CONSTITUTIONAL LAW**.

WARRANTY.

See **EXECUTORS AND ADMINISTRATORS**, 16.

WATERCOURSES.

1. **ONE WHO CONVEYS WATER BY MEANS OF ARTIFICIAL CANALS INTO NATURAL STREAM IN WHICH ANOTHER HAS WATER RIGHT** by prior appropriation may afterwards divert an equal amount above the latter's dam, provided he does not injure his right. *Butte C. & D. Co. v. Vaughn*, 769.
2. **PRIOR RIGHT TO USE OF NATURAL WATER OF STREAM** does not entitle the owner of such a right to the exclusive use of the channel. So long as his water right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If such prior owner receives his full supply as prior to the use of the channel by others to carry water introduced therein, he has no cause for complaint. *Id.*

1. **BURDEN OF PROOF IS ON PARTY WHO CONVEYS WATER INTO STREAM ABOVE ANOTHER'S DAM**, where the latter has a water right, and who wishes to divert such water before it reaches the dam, to show that he diverts no more than he conveyed into the stream. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Id.*
4. **IN ACTION FOR DAMAGES FOR DIVERSION OF WATER** defendants in possession cannot prove an older and better title in third persons, unless such persons are made parties, and the facts specially set up. *Humphreys v. McCall*, 621.
5. **NAVIGATOR ON STREAM WHICH IS PUBLIC HIGHWAY MAY REMOVE OBSTRUCTION**, as raft or the like, in the most speedy way, if the exigencies of the case require it, and is only liable for injury thereby where he is guilty of gross negligence or willful destruction. Party removing the obstruction is bound to use the same degree of caution that a careful man would exercise in reference to his own property. *Beach v. Schoff*, 122.

See USAGES

WAYGOING CROP.

See LANDLORD AND TENANT, 13-15.

WILLS.

1. **INSTRUMENT IS WILL, WHATEVER ITS FORM**, if the intention of the maker to dispose of his estate after death be sufficiently manifested, and this intention be lawful in itself, and the writing have the statutory formalities. *Babb v. Harrison*, 203.
2. **WILL DOES NOT TAKE EFFECT UNTIL TESTATOR'S DEATH**, and therefore, if a will is written and executed before the passage of a law, but the testator does not die till after the enactment of the law, the will is created after the passage of the law, and must be governed by it. *Price v. Taylor*, 105.
3. **ESTATE-TAIL GENERAL IS CREATED IN A. B. T., DEVISEE**, under the following provision in will, if considered independently of the Pennsylvania act of 1855, viz.: "I give and bequeath all my certain land . . . to my granddaughter, A. B. T., for and during her life, provided she shall not leave issue at her death; but if she shall leave lawful issue at her decease, then it is my will that my plantation shall go in fee-simple to her heirs forever. In case she shall not leave issue at her death, I give and devise my said plantation to the children of my sister, R. B.; it to be sold and the proceeds divided between them, share and share alike; and if any of my said nieces or nephews, the children of my said sister R., should be deceased, leaving children, their shares respectively to go to said children." The fact that the devise over is on an indefinite failure of issue will not prevent the devise from creating an estate-tail; and the limitation to the issue in fee-simple goes for nothing, as being inconsistent with the lineal descent with which the estate starts. *Id.*
4. **NAME OF TESTATOR AT COMMENCEMENT OF OLOGRAPHIC WILL** is not a sufficient signing of the will, unless it appears affirmatively from something

on the face of the paper that it was intended as his signature, under Virginia statute which provides that will must be signed "in such manner as to make it manifest that the name is intended as a signature." *Ramsey v. Ramsey's Ex'r*, 438.

5. LANDS ACQUIRED AFTER MAKING OF WILL DO NOT PASS THEREBY, under the South Carolina act of 1791, unless there has been a subsequent republication of the will, but they descend to the heir at law. *Landrum v. Hatcher*, 237.

6. STATUTORY PROVISION AS TO ADVANCEMENTS HAS NO JUST APPLICATION, where the testator distributes his property with the intention of disposing of it all, but inadvertently leaves a residuum by omitting to put any residuary clause in his will. *Needles's Ex'r v. Needles*, 85.

See DEEDS, 1-3; ESTATES OF DECEDENTS; ESTATES-TAIL; EXECUTORS AND ADMINISTRATORS, 30-35; MARRIED WOMEN, 1-3.

WITNESSES.

1. SURETY OF ADMINISTRATOR IS NOT COMPETENT AS WITNESS to prove item of credit upon final accounting. *Henderson v. Simmons*, 590.

2. WITNESS IS NOT COMPETENT TO TESTIFY TO GENUINENESS OF BANK NOTE who has never seen a genuine note of that bank, but whose knowledge of its notes is derived from fac-similes engraved or descriptions printed in a bank reporter or directory. *State v. Brown*, 168.

3. NO ONE IS COMPETENT TO TESTIFY TO GENUINENESS OF SIGNATURE who is not acquainted with the signer's handwriting from seeing him write, or from frequently seeing specimens of it, or from a comparison before the jury of the questionable handwriting with specimens of it, produced, admitted, or clearly proved to be not only genuine, but not got up for the occasion. *Id.*

4. WITNESS IS INCOMPETENT TO TESTIFY TO GENUINENESS OF HANDWRITING who is acquainted with it only from printed descriptions and fac-similes. *Id.*

See CORPORATIONS, 21; EXECUTORS AND ADMINISTRATORS, 35.

WEIGHTS AND MEASURES.

TWO THOUSAND POUNDS AVOIRDUPOIS WEIGHT CONSTITUTE TON in Pennsylvania: *Evans v. Meyers*, 25 Pa. St. 114. *Weaver v. Fogely*, 151.

See CONSTITUTIONAL LAW, 5.

WRECKS.

See COMMON CARRIERS, 5.

WRITS.

See ATTACHEMENTS; EXECUTIONS; HABEAS CORPUS; MANDAMUS.

WRIT OF ERROR.

See HABEAS CORPUS.

WRIT OF RESTITUTION.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2; MANDAMUS, 1.

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